Francis Hargrave.

REPORTS

In Selwin v. Selwin 1. Blackst. Rep. 223. Judge Foster is stated to have [illegible] Selwin's citing a case from this third volume of Salkeld, that he had all the reporters in his study, but did not know Salkeld."

OF

CASES

Adjudged in the

Court of King's Bench;

TOGETHER WITH

Several Special CASES adjudged in the Courts of *Chancery*, *Common Pleas*, and *Exchequer*; from the Revolution to the Tenth Year of Q. *ANNE*.

By *WILLIAM SALKELD*,
Late Serjeant at LAW.

With Two Tables; the one of the Names of the Cases, the other of the Principal Matters therein contained.

VOL. III.

Printed from the Original Manuscript, written by himself.

In the *SAVOY*:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer* Esq;) for R. Gosling at the *Middle-Temple-Gate* in *Fleet-street*; and T. Ward in the *Inner-Temple-Lane*.

M DCC XXIV.

THE PREFACE.

SINCE the former Volumes of Mr. Serjeant Salkeld's *Reports were publiſhed with the Approbation of the moſt eminent Profeſſors of the Law, it may not be improper to inform the Reader, that the following Caſes were undoubtedly collected by the ſame Hand.*

This will be very evident to thoſe who read and compare them with the former, becauſe the ſame Judgment and Perſpicuity runs through the Whole; and as an indubitable Proof, that theſe Caſes are Genuine, the Original Manuſcript, from whence they were tranſcribed, written by the Author's own Hand, is now in the Poſſeſſion of the Editors, and may be ſeen by any Perſon that deſires it.

This Volume contains more than Four hundred and forty Caſes, and altho' the Names of ſome of them have been already printed, yet they are only the Names, and not the Matter, ſince the Arguments both

of the Bench and at the Bar are generally new; and in all of them ſome new Matter is added, which renders this Collection a proper Supplement to thoſe that have been already printed.

There are likewiſe ſome Caſes abridged in the following Collection, which may be found more at Large in the Cotemporary Reports; but even theſe may be of ſome Uſe, becauſe they are placed under proper Titles, in Imitation of Rolle's Abridgment; *and it may reaſonably be preſumed, that the learned Serjeant would not have abridged any Caſes but thoſe that were ſuitable to ſuch Titles, and very well worthy of Obſervation.*

And ſince Orders made by Juſtices of Peace, concerning the Removal and Settlement of the Poor, have of late made a conſiderable Title in the Law, and ſince it appears by the Author's former Reports, that he took particular Care to State the Reſolutions of the Judges in ſuch Caſes, the Reader will find in this Volume ſeveral Judgments in Caſes of that Nature, and thoſe digeſted under proper Titles, which were never yet printed in any Book of Reports whatſoever.

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Abate-

ABATEMENT.

Anonymus. Mich. 4 Annæ.

AN Administrator brought an Action of Debt on a Bond, the Defendant pleaded in Abatement, that Administration was granted to another, and upon a Demurrer it was insisted, that tho' this is Matter in Bar, yet it might be pleaded in Abatement; for so it is in the Case of Outlawry and Property, which may be pleaded either in Bar or in Abatement: But per Holt, Ch. Just. it was ruled, that the Defendant should answer over, for Matter in Bar must not be pleaded in Abatement.

Matter in Bar may be pleaded in Abatement.

Kemp *versus* Andrews. Mich. 2 Will. III. B. R. Rot. 289.

IN Trover and Conversion, the Plaintiff declared, that he, together with A. and B. both now dead, and whom he survived, being possessed of a Ship and Goods lost them, and that the Defendant found and converted them to his own Use, who pleaded in Bar to the Action, that the said A. and B. made their Wills in Writing, and thereby appointed several Executors and died, and they in their Life-time, together with the Plaintiff, were possessed of this Ship and Goods as Merchants, and that there is no Survivorship between Merchants, and so concludes in Bar; and upon Demurrer to this Plea it was adjudged ill in Bar, but it had been a good Plea in Abatement.

3 Lev. 290. Where a Plea is ill in Bar, but good in Abatement.

ABILITY and DISABILITY.

Anonymus. Mich. 2 Annæ.

A Woman may execute an Office by her ſelf or by Deputy.

A Woman was appointed by the Juſtices to be Governeſs of a Work-houſe at Chelmsford, and Mr. Parker moved to quaſh the Order, becauſe it was in the Nature of an Houſe of Correction, and ſo the Office was not ſuitable to her Sex: But per Powell and the reſt, abſente Holt Ch. Juſt. 'tis a good Appointment, and ſhe may be capable of executing the Office either by her ſelf or Deputy, as the Lady Broughton did, who was appointed Keeper of the Gatehouſe at Weſtminſter.

ACCEPTANCE.

Where the Title is to a Thing in Groſs, a Man is not bound to accept it by Parcels.

ADjudged, that where a Man is entitled to a Thing in Groſs, he is not bound to accept it by Parcels; as for Inſtance, if A. be bound to deliver a Tun of Wine to B. and tenders Part of it, B. is not bound to accept it.

Leſſor is not bound to accept Part of the Rent,

So where the Leſſor diſtrains for Rent in arrear, and the Leſſee tenders Part of it, the Leſſor is not bound to accept it; but if he diſtrain for Arrears due at ſeveral Days, on which it ought to be paid, and the Leſſee tenders the Arrears due on ſuch a Day, the Leſſor is bound to accept it. The Caſe is the ſame if the Leſſor bring an Action of Debt inſtead of diſtraining for the Rent due on ſeveral Days, but if there is no Tender of any Part, and the Leſſor get Judgment for the Whole, 'tis now become an entire Duty, and if upon Execution ſued out the Leſſee tenders any Part of it, the Leſſee is not bound to accept.

In Detinue the Plaintiff is not bound to accept Part

So in Detinue for divers Parcels of Goods, if the Plaintiff get Judgment for the Whole, and after Execution taken forth the Defendant tenders ſome Part to the Plaintiff, he is not bound to accept it.

Lease for Years, rendring Rent, Proviso to be forfeited if the Lessee alienes or assigned to another; the Lessee aliened, and the Executor of the Alienee paid the Rent to the Lessor, and tho' it was not alledged, that he did know the Lease was * aliened, (viz.) by Assignment to another, but only that he (the Lessor) knowing the other to be the Executor of the Assignee, had accepted the Rent of him; it was adjudged he should not enter for a Forfeiture against his own † Acceptance, for it shall be intended he had Notice of the Assignment, if the contrary doth not appear. See ** Whitchcot's Case.

No Entry for a Forfeiture after Acceptance of the Rent. * See 3 Rep. *Pennant's* Case. Cro. Eliz. 453. Moor 456. S. C. † 2 Bulst. 151. Cro. Eliz. 715. ** 2 Cro. 398. 1 Roll. Rep. 389.

So if the Lessee covenant for him and his Assigns to repair, the Assignee of the Lessee by his accepting such Assignment is liable, for this is a Covenant which runs with the Land.

The Husband and Wife made a Lease of the Lands of the Wife, then the Husband died, and the Wife married again, and this second Husband accepted the Rent. Adjudged, that by such Acceptance he had affirmed the Lease, even quoad the Wife her self, because she had resigned her Election to her second Husband, and he by his Acceptance of the Rent had affirmed the Lease.

Dyer 195. Rolls 475.

Lease to W. R. for Life, rendring Rent at Michaelmas, with a Clause of Re-entry for Non-payment, the Rent was in Arrear, and afterwards the Lessor brought an Action for the Rent. Adjudged, that notwithstanding this Action he (the Lessor) might still enter for a Breach of the Condition, for the Action for the Rent did not affirm the Lease, because it shall be intended to be brought as for a Duty due upon the Contract; but if he had distrained for the Rent not being paid on the Day, then he can never afterwards enter for a Breach of the Condition, because the Distress affirms the Continuance of the Lease.

1 Inst. 211. 1 Leon. 262.

A Gift was made to the Husband and Wife, and to the Heirs of their Bodies, they afterwards made a Lease of the Lands, reserving Rent on such a Day, with a Clause of Re-entry, then the Husband died, and the Rent being in Arrear the Issue in Tail accepted it. Adjudged, that this was no Affirmance of the Lease as to himself, because the Rent was not due to him whilst his Mother was living; but it had been otherwise, if he had accepted it after her Death.

3 Rep. 64. Where Acceptance of the Rent is no Affirmance of the Lease.

Adjudged, That an Acceptance of a collateral Thing is no Bar to a Title of Freehold, and that an Acceptance of Rent after the Day of Payment will not bar a Right of Entry vested by Non payment, because the Rent being a Duty, and owing,

Acceptance of Rent after the Day of Payment no Bar to a Right of Entry.

the Party might well accept it; but 'tis otherwise after a Diſtreſs taken, or if the Rent is accepted at another Day ſubſequent, for this affirms the Continuance of the Leaſe.

Anonymus.

Acceptance of Rent will not make a Leaſe good.

LEaſe for Years upon Condition to be void, if the Leſſee aſſigns over the Term; he afterwards made an Aſſignment, and the Leſſor knowing it accepted the Rent. Adjudged, this will not make the Leaſe good, becauſe it was abſolutely void before the Acceptance.

Smith *verſus* Arnold.

* Cap. 34. Aſſignee is liable to all Covenants which run with the Land.

† 1 Salk. 199.

THE Statute * 32 H. 8. enables a Grantee of a Reverſion to enter for a Condition broken, and to bring an Action of Covenant, &c. The Caſe was, Leſſee for Life covenants for himſelf, his Executors and Adminiſtrators, to † build an Outhouſe on the Lands of the Leſſor, and afterwards the Leſſee for Life aſſigns his Eſtate to T. S. The Queſtion was, whether ſuch Aſſignee might be charged in an Action of Covenant, if the Outhouſe was not built? It was inſiſted, that he could not, becauſe the Aſſignor had covenanted only for himſelf, his Executors and Adminiſtrators, leaving out the Word Aſſignes, which is very true: But adjudged, that the Aſſignee by the ** Acceptance of the Poſſeſſion of the Lands, had made himſelf ſubject to all the Covenants which run with the Land, of which Repairing is one, Building is another, and to ſuch he is bound without being named by that ſpecial Word Aſſignes, but not to any collateral Covenants.

** 2 Cro. 125. Godb. 69. 5 Rep. 24. Moor 399.

Wallis *verſus* Wood.

When Part of the Rent became due, pending an Action againſt an Adminiſtrator.

LEaſe for Years was made to T. S. rendring Rent, which being in Arrear the Leſſee died Inteſtate, and Adminiſtration was granted to the Defendant, againſt whom an Action of Debt was brought for the Rent, who pleaded, that the Inteſtate had aſſigned the Term, and that after ſuch Aſſignment the Leſſor had accepted Rent of the Aſſignee. The Parties were at Iſſue upon the Acceptance of the Rent, and the Plaintiff had a Verdict; but becauſe Part of the Rent became due, pending the Action, the Plaintiff could never get Judgment.

Parker *verſus* Webb.

THE Caſe was, the Leſſor being ſeiſed in Fee, made a Leaſe of the Lands for Years to the Defendant, rendring Rent at Michaelmas and Lady-Day, in which Leaſe the Defendant covenanted to pay the Rent, &c. afterwards the Leſſor granted the Reverſion to the Plaintiff, to which Grant the Defendant attorned, and an Action of Covenant being brought againſt him for Non-payment of Rent, he pleaded, that he had aſſigned his Term to D. D. before the Grant of the Reverſion made to the Plaintiff, and upon a Demurrer to this Plea, per Holt Ch. Juſt. 'tis ill; for he ought to have ſet forth, that the Plaintiff had accepted Rent from the Aſſignee, or that he had Notice of the Aſſignment; but if that had been pleaded, the Plaintiff ſhould ſtill have Judgment, becauſe he, being Grantee of the Reverſion, may maintain this Action againſt the Leſſee, even after the Aſſignment of the Term, and tho' he had accepted the Rent after ſuch Aſſignment; and this he might do upon the expreſs Covenant of the Leſſee to pay it, which is a Covenant that runs with the Land.

Grantee of a Reverſion may have Covenant after the Aſſignment of the Term.

ACTION in GENERAL.

ADjudged, that a Scire Facias, or any Writ to which the Defendant may plead, is an Action, or by which a Plaintiff may recover. 6 Rep. *Fine's* Caſe.

In Perſonal Actions, if the Plaintiff is barred, as in an Action of Debt or Accompt, he can never bring the ſame Action again, nor hath he any Remedy but by Writ of Error, or Attainting the Jury.

But in Real Actions, if the Plaintiff is barred he may reſort to a higher Remedy; as if he is barred in an Aſſiſe he may bring a Mortanceſtor; if in a Formedon in Deſcender, he may bring a Formedon in Reverter or Remainder.

If a Man recover in Treſpaſs he ſhall not afterwards have Mayhem, for 'tis to get the ſame Recompence again; but he may have an Appeal of Robbery, becauſe the Judgment is not for Damages, but againſt the Life of the Defendant. 4 Rep. 45. Moor pl. 416. *Hudſon's* Caſe.

Where

1 Cro. 75. Yelv. 67. Where two are bound jointly and severally in a Bond, and the Obligee gets Judgment against one and takes him in Execution, yet he may proceed against the other, because the Debt is not paid or satisfied.

And so he may, if the Sheriff suffer him, whom he had in Execution, to Escape.

One promises to pay W. R. 40 l. (viz.) 10 l. on such a Day, and so on till all is paid; an Action lies upon the first Failure of Payment.

So 'tis in * Covenant, and so 'tis in a Recognizance.

* Cro. Eliz. 118. 1 Cro. 241. 1 Inst. 292. But if a Bond of 40 l. is given conditioned to pay (viz.) 10 l. on such a Day and so on, Debt will not lie till the last Day.

Owen 42. 1 Cro. 241. 2 Saund. 337. But if the Bond is to pay 20 l. on such a Day, and 20 l. on such a Day, there Debt will lie upon the first Failure; therefore there is a Difference where a Bond is to pay 40 l. (viz.) 10 l. on such a Day, and so on, and where 'tis to pay 20 l. on such a Day, and 20 l. more on such a Day, because in the Case of the videlicet, tho' the Duty is intire, the videlicet divides the Parcells.

But where a Man is bound in a Bond to pay 100 l. (viz.) 50 l. on such a Day, and 50 l. on such a Day, Debt lies upon the first Failure, because the Condition is broken.

Cro. Eliz. 68, 110. Where it appears upon the Record, that the Action is brought before the Cause of Action arises, either in the Declaration or in the Verdict, or otherwise by the Plaintiff's own Shewing, he shall never recover; but where it is a Matter alledged by the Defendant, but not insisted on, so that Issue is taken upon another Point, and the Truth of the Fact alledged doth not appear, there the Plaintiff shall have Judgment, if he recover.

ACTION POPULAR.

ADjudged, that the King has no Privilege in an Action qui tam pro Domino Rege, &c. and that the Proſecutor may pray a Tales without the Conſent of the Attorney General, and he may be Nonſuit.

Et per Holt, Ch. Juſt. Where a certain Penalty is given by a Statute to the Party grieved he needs not join the King, for 'tis like a private Act, only for his Benefit.

But it lies for * Indicting a Man in a Foreign Country; it lies for a † Scandalum Magnatum, for the King is prejudiced by the Act, which is the Ground of the Action.

* Raſt. Ent. 433.
† Raſt. Ent. 126, 193.

It lies againſt the Sheriff if one taken upon a Capias Utlagatum eſcape, or againſt the Reſcuer, if he be reſcued; but the Plaintiff is not bound to bring it in Tam quam, &c. but may bring Debt alone in his own Name. Et nota, In theſe Caſes, tho' the Action is in the Tam quam, the Party ſhall have all the Damages; but in ſome Caſes, as upon the Statute of Hue and Cry, and the Statute for not appearing as a Witneſs, being ſerved with a Subpœna, the Party may either bring Debt or Caſe; if he bring Debt, he muſt ſue without the King, for the Debt is not due to him, but to the Party grieved; but if he bring an Action on the Caſe, he muſt ſue in the Tam quam, for the Action is founded on the Tort only, and that is to the King as well as to the Party, per Holt, Ch. Juſt.

Roll. Abr. 1. 2 Cro. 361, 620. Bridgm. 8. 1 Roll. Rep. 78.

Nota, The following Rule was made by the Court in *January* 1682. That all Clerks of the Aſſiſe and Aſſociates do return the *Poſteas in all Popular Actions and Informations Qui tam*, &c. into the reſpective Offices from whence they iſſue, and to receive their Fees for the returning thereof at the Trial from the Party, for whom the Verdict ſhall be given, and that the Maſters of the reſpective Offices, to whom the ſaid *Poſteas* ſhall be returned by the Clerks of Aſſiſe ſhall ſend a Note into the Exchequer to the Clerks of the Eſtreats, that the Sheriffs of the reſpective Counties may be charged with the ſame.

Raym. 479. S. C. Clerks of Aſſiſe to return the *Poſteas* in all Popular Actions.

ACTIONS on the CASE.

Good and not good, where brought before the Time of Action.

Rogers *verſus* Rearsby. Paſch. 2 Annæ.

The Eſſoin-Day was the Day in which the Demiſe was laid, and good.
* 1 And. 240.

IN Ejectment, the Demiſe was laid on the 20th Day of October; upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, That the * Eſſoin-day, which in the Law is accounted the firſt Day of the Term, was on the ſame 20th Day of October, on which the Demiſe was laid, and ſo this Ejectment was brought by the Plaintiff before he had any Cauſe of Action; but this Objection was not allowed, for per Curiam, the Action and the Wrong may be upon one and the ſame Day, and this being by Original may be ſued out after the Commencement of the Term, and returned, eſpecially in ſo long a Term as Michaelmas Term is; but admitting it to be a Slip, the Defendant ſhould have taken Advantage of it upon Oyer.

Blackhall *verſus* Evans. Mich. 3. Georgii.

Battery laid to be done on a Day not yet come.
† 1 Lev. 299.

** Hob. 189, 245, 277. S. P.

†† Cro. Eliz. 68, 110. ad. Raym. 463.

IN Aſſault and Battery, upon Not guilty pleaded the Plaintiff had a Verdict; it was objected in Arreſt of Judgment, That the Battery was laid to be committed on a Day † not come when the Verdict was given; but this Objection was diſallowed, becauſe it being impoſſible it ſhould be committed after the Verdict was given, 'tis as if no Time at all had been laid in the Declaration, for an ** impoſſible Time is no Time, and in ſuch Caſe it can never be intended that the Jury gave Damages for a Battery which was not then done: 'Tis true, if the Plaintiff had laid a Time after the Action and before the Verdict, the Damages muſt be intended to be given for the Battery then done, that is, at the Time of the Action brought; but that ought not to be, †† becauſe at that Time the Plaintiff had no Cauſe of Action.

Smith

Smith *verſus* Weſthal.

By the Statute of * Frauds, &c. 'tis enacted, That no Action ſhall be brought upon any Agreement, which is not to be performed within a Year after the making thereof, unleſs there be a *Memorandum* of the Agreement in Writing, and ſigned by him who is to be charged therewith. An Agreement was made, that in Conſideration of 5 l. paid by the Plaintiff to the Defendant, he (the Defendant) promiſed to pay the Plaintiff 10 l. upon his Day of Marriage, which happened about 9 Years after this Agreement; and now an Action being brought upon this Promiſe, it was adjudged, that a Memorandum in Writing was not neceſſary in this Caſe, becauſe the Marriage might have happened within a Year after the Agreement made.

* 29 Car. 2. cap. 3. Par. 17.

Where a Memorandum in Writing is not neceſſary. See poſtea *Bourkmire* v. *Darnell.*

Sawen *verſus* Hulbert.

In Trover the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Declaration was ill; becauſe the Converſion was laid on a Day certain in Michaelmas Term, and the Declaration was General as of that very Term without a Day certain; as Memorandum, that on ſuch a Day, and therefore it muſt relate to the firſt Day of that Term, and if ſo, then this Action was brought before the Plaintiff had any Cauſe of Action, becauſe it was brought as the firſt Day of the Term, and the Converſion, which is the Foundation of the Action, was laid in the Declaration to be after the Term began. But per Holt, Ch. Juſt. 'Tis well enough, if the Bill was filed after the Cauſe of Action accrued, for there was no Action depending till that very Time, and the filing the Bill was on a Day certain.

In Trover, the Declaration was General, as of *Michaelmas* Term, and the Converſion was laid on a Day certain in that Term, and yet good.

For Maleſeaſance, Miſeaſance and Negligence.

Keeble *verſus* Hickeringhall.

CASE, &c. in which the Plaintiff declared, that he was poſſeſſed of a Decoy Pond frequented with Ducks, of which he made great Gains, and that the Defendant knowing and malitiouſly intending to deprive him (the Plaintiff) of the Uſe and Benefit of his ſaid Decoy Pond, did on ſuch a Day and Place, at one Time, diſcharge and ſhoot of ſix Guns, and at another Time 4

Caſe lies where the Plaintiff had a Poſſeſſion without any Property.

Guns, to fright away his Ducks, &c. upon Not guilty pleaded the Plaintiff had a Verdict; 'twas objected in Arrest of Judgment, That the Defendant stood on his own Ground, and so could not be guilty of a Trespass in the Close of the Plaintiff; besides, the Declaration is ill; for the Plaintiff did not set forth, how many Ducks were frighted away, or if he had, it had been ill, because being Wild-Ducks, he had no Property in them. Holt, Ch. Just. A Decoy Pond is a Kind of Trade, and of great Profit to the Owner, and by the same Reason that an Action will lie for malicious Words spoken by one Tradesman of another, it will lie for a malitious Act done by one to another, for in both Cases 'tis prejudicial to the Plaintiff. If one Man keeps a School in such a Place, another may do so likewise in the same Place, tho' he draw away the Scholars from the other School, 'tis true, this is damnum, but 'tis absque injuria; but he must not shoot Guns at the Scholars of the other School, to fright them from coming there any more. And as to the other Objection, the Plaintiff needs not shew how many Ducks were frighted, because 'tis impossible for him to do it, and tho' they were Wild, yet they were flumineæ volucres, and in the Plaintiff's Decoy Pond, and so in his Possession, which is sufficient, without shewing that he had any Property in them.

Wheeler *versus* Baker. *Mich.* 8 *Guilielmi.*

Where the whole Term was assigned by Parol, the Assignor cannot have an Action, because he hath no Residuary Interest.

LEssee of an House for 3 Years, Assigns it to W. R. for 3 Years by Parol; the House was afterwards burnt, and the Assignor brought an Action on the Case against the Assignee for Damages. Adjudged that it would not lie, because he had no Residuary Interest in the House, neither is he liable over to the first Lessor, because the Assignment was lawful: The Case had been the same, if he (the Plaintiff) had demised to W. R. for 5 Years, for this would only have amounted to an Assignment of his Term, so that he gains no Reversion by it; 'tis true, it had been otherwise, if the Lease had been by Indenture or Estoppel; but if the Lessee had assigned for two Years, he might have an Action against W. R. the Assignee, because there was a Reversion in him (the Lessee) and in such Case 'tis always necessary for him to declare, that he had an Interest adtunc ventur' (viz.) when the House was burnt. But this Action is now taken away by the Statute * 6 Annæ, by which 'tis enacted, That no Action shall be maintained against any one in whose House or Chamber any Fire shall accidentally begin; and if any Action shall be brought, the Defendant may plead the General Issue, and give this Act in Evidence, and if the Plaintiff be Nonsuit, discontinue, or a Verdict be against him, the Defendant shall have treble Costs. Proviso, that nothing therein shall make void any Agreement between Landlord and Tenant.

* 6 Annæ cap. 31.

This Act was only Temporary for 3 Years; but by another Statute Anno * 10 Annæ, this Clause was made Perpetual.

* 10 Annæ. cap. 14.

Coggs *versus* Bernard. Trin. 2 Annæ. 2 Salk. 733.

the Pleadings.

IN an Action on the Case against the Defendant, for his Negligence in performing what he had undertaken to do; there was a Verdict for the Plaintiff, and it being objected in Arrest of Judgment, That in this Case there was no Consideration to entitle the Plaintiff to an Action, for the Defendant was to have no Reward; and it did not appear, that he was a Common Carrier or Porter, so that by Custom or Usage he might lawfully claim a Reward. Holt, Ch. Just. in arguing this Matter, declared, That if the Agreement had been only Executory (i. e.) if the Defendant had assumed to take up the Hogshead of Brandy out of one Cellar, and lay it down in another (which was this Case) and had not done it, this Action would not have laid against him, like the Case in 11 H. 4. 33. when the Action was brought against the Defendant, upon a Promise to build an House for the Plaintiff, by such a Day, which he had not done; it was held, that the Action would not lie, for the Reason before mentioned; but that differs from the principal Case, because the Defendant had actually entred upon the Performance of the Thing which he had promised to perform, and the Plaintiff relying on the Defendant's Promise, had trusted him to do it, who by his Negligence had deceived him, and 'tis the Deceipt which is the Ground of this Action; 'tis true, the Defendant was not bound to enter upon this Trust, but if he doth, he must take Care that the Plaintiff be not damnified by his Neglect. He admitted, That there was a contrary Resolution * in Yelv. (viz.) That if W. R. deliver Goods to L. R. and in Consideration thereof he promise to redeliver them, yet no Action will lie against him, if he doth not redeliver them; which Resolution is not Law. That in † 2 Cro. it was otherwise resolved (viz.) where Money was delivered to one to pay over to another sine mora. Adjudged, That an Action would lie against the Defendant, if he did not pay it over; for tho' he had no Benefit by this Undertaking, yet, if he take the Trust upon him, he is bound to perform it. See 3 H. 6. 36. Owen 141. Keilw. 160. He likewise held, That where a Man carrying Goods is of a publick Employment; as a Carrier, Wharfinger, Hoy-man, or Master of a Ship, he must answer all Events, excepting only the Acts of God, and the Enemies of the King, and that this is a Politick Establishment, for the Safety of all Persons concerned, and whose Affairs necessitate them to intrust such Carriers; for by this Means all private Combinations between them and

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* Yelv. 128.

† 2 Cro. 667.

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Highwaymen, and other Robbers, are prevented, which cannot eaſily be diſcovered. But if a Bailiff or Factor carries Goods, and is robbed, he is not liable to the Owner, tho' he hath a Premium, becauſe 'tis only a particular Office, and a private Truſt; he doth the beſt he can, and it would be unreaſonable to charge him with a Truſt farther than the Nature of the Thing puts it in his Power to perform. The ſame Law of a Factor; therefore if he is robbed, he ſhall not be chargeable, for 'tis ſufficient, if he takes the ſame Care that the Owner himſelf would have done. But where Goods are delivered to be carried gratis, or to do any Thing about them, without any Reward, which is called by Bracton * Mandatum, and in Engliſh, acting by Commiſſion; this alſo obliges him to a diligent Management and Care of the Goods which is implied in the very Undertaking; and tho' the Truſt was Voluntary, yet by the Breach thereof, a Fraud is put upon the Deliverer, which is a ſufficient Ground to ſupport this Action.

* Lib. 3. 100.

Bird *verſus* Stroud. Trin. 8 Will. III. B. R.

Where the Action is grounded on the Poſſeſſion, the Plaintiff needs not ſhew a Title.

CASE, &c. in which the Plaintiff declared, That he being poſſeſſed of a Tenement (to which he had and ought to have a Way) and to which he had, and ought to have Common of Paſture in D. the Defendant had digged Coney-Boroughs there per quod, &c. Upon Demurrer to this Declaration, the Defendant had Judgment in C. B. and now upon a Writ of Error in B. R. that Judgment was affirmed: The Objection was, That the Plaintiff had not ſhewed any Title to this Common, either by Grant or Preſcription, and adjudged he need not, becauſe the Action is grounded upon the * Poſſeſſion, and it doth not appear but that the Defendant is a meer Stranger; beſides the Title is not Traverſable, but to be given in Evidence upon the Trial of the Iſſue.

* 2 Cro. 43, 122. Cro. Car. *Sands* verſus *Trefuſis*. 1 Vent. 356. S. P.

Buxentine *verſus* Sharp. Paſch. 8 Will. III.

Action will not lie for keeping a Mad Bull without ſaying *ſcienter*.

THE Plaintiff declared, That the Defendant kept a Bull, which uſed to run at Men, but did not ſay ſciens or ſcienter; and this was adjudged ill after a Verdict, becauſe the Action will not lie, unleſs the Owner knew the Quality of his Bull, and it cannot be intended that this was proved at the Trial, becauſe the Plaintiff is not bound to prove more than is laid in his Declaration.

Jenkins *verſus* Turner.

THE Plaintiff declared, That the Defendant kept a Boar, ad mordendum animalia conſuet', and that he knew of this Quality; after a Verdict for the Plaintiff, and a Motion in Arreſt of Judgment, this Declaration was held good, tho' it was objected, that Animalia mentioned in the Declaration might be Froggs; for it ſhall be intended the Proof at the Trial was, that this Boar bit ſuch Animals as will ſupport the Action, otherwiſe the Jury would not have found a Verdict for the Plaintiff, and have given Damages. There was another Objection to this Declaration (viz.) That the Defendant cannot know what Animals he is to defend againſt; but it was anſwered, no Evidence could be given of killing or biting any Animals but of ſuch of which he had Notice.

Caſe againſt the Defendant for keeping a Boar which uſed to bite *Animalia*, not ſaying what Animals, good.

Crowther *verſus* Oldfield. Paſch. 2 Annæ Rot. 233. B. R.

CASE, &c. for diſturbing him in his Common, in which the Plaintiff declared, That he was ſeiſed of a Meſſuage, &c. Parcel of the Manor of W. Tent' per Copiam rotulorum Curiæ ejuſdem manerii ut tenen' Cuſtumarius in feodo ſimplici ſecundu' conſuetudinem Manerii, and that he and all the Tenants of the ſaid Manor, had Time out of Mind Common on the Waſtes of the ſaid Manor, for all Beaſts Levant and Couchant upon their Copyholds. This Declaration was adjudged ill, after a Verdict which had found it to be Parcel of the Manor, as the Plaintiff had ſet forth in his Declaration, becauſe the Words ad voluntatem Domini being left out, it doth not appear to be Copyhold; ſo that taking it to be Freehold and not Copyhold, then the Preſcription ſhould have been by a Que Eſtate at Common Law, in his own Name, and not in the Name of the Lord. In arguing this Caſe, Holt Ch. Juſt. ſaid, That a Copyholder hath Right of Common, either as belonging to his Eſtate, or to his Land; that where it belongs to his Eſtate, and as ſuch he claims Common in the Lord's Waſte there, if the Copyhold is infranchiſed, the Common is loſt and extinguiſhed, for that continues when the Eſtate is gone; the other Common is as belonging to his Land, (viz.) where a Copyholder hath Common in the Waſtes of another Manor, in that Caſe the Common is not loſt by an Infranchiſement of the Copyhold, becauſe tho' the Eſtate is gone, the Land ſtill continues. It was argued for the Plaintiff in the Original Action, That this Title ſet forth in his Declaration (admitting it to be bad)

Mod. Caſes 19. 1 Lutw. 126. 1 Salk. 364, 170. Where a Copyhold is pleaded, the Omiſſion of the Words *tent' ad voluntatem Domini* makes it ill.

bad) ought to be recited as Unneceſſary and Surpluſage, and the rather, becauſe there was no Occaſion for him to ſet forth any Title; he had the Poſſeſſion, and that is ſufficient againſt the Defendant, who was a Stranger and Wrong-doer, which is very true; but if he will ſet forth a Title, as he had done in this Caſe, and that Title is inconſiſtent in itſelf, a Verdict will not help it; now here he could have no Title as a Copyholder, becauſe it doth not appear, that he held ad voluntatem Domini, and he could have none as a Freeholder, becauſe he had preſcribed in the Manor, ſo that his Title being abſurd and inconſiſtent, the Declaration muſt be ill; and for that Reaſon the Judgment in C. B. was now affirmed in B. R. for the Defendant in Error.

Smith *verſus* Ary. Hill. 2 Annæ B. R.

Poſtea Gaming. (1.) Mod. Caſes, 128.

Indebitatus Aſſumpſit will not lie for Money won at play.

THE Plaintiff declared, That in Conſideration he had agreed and promiſed the Defendant to play at ſuch a Game, and to pay what he loſt, the Defendant promiſed to play, &c. and to pay, &c. and ſets forth, that they played, &c. and that the Defendant loſt ſo much, which he had not paid; Cumque etiam, he (the Plaintiff) had won ſo much Money ad ludum pred', the Defendant in Conſideration inde, promiſed to pay, &c. Upon a Demurrer to this Declaration it was inſiſted for the Plaintiff, that the mutual Promiſes in the firſt Count muſt be underſtood as if repeated in the ſecond, (viz.) That the Playing was upon the ſame Agreement, being alledged to be won, ad ludum pred'. Sed per Curiam, The ſecond Count is not the better for the firſt, for they are ſeparate and diſtinct, ſo that the Agreement laid in the firſt, will not go to the ſecond; and that an Indebitatus Aſſumpſit will not lie for Money won at Play, ſo there was nothing but * mutual Promiſes, and Debt will not lie upon a Promiſe, nor by Conſequence an Indebitatus, but there muſt be a Conſideration, or a Quid pro quo, &c.

* Hob. 18, 88. 1 Vent. 51, 44, 96, 153. Hard. 486. 3 Lev. 118.

Roe *verſus* Haugh. Paſch. 9 Will. III. in Camera Scaccarii.

What ſhall be mutual Promiſes after a Verdict.

THE Caſe was, B. was indebted to A. in 42 l. and C. in Conſideration that A. would accept him to be his Debtor for the 42 l. due to the ſaid A. by and from B. ſuper ſe Aſſumpſit & eidem A. fideliter promiſit quod ipſe eaſdem 42 l. would pay to him. And an Aſſumpſit was brought againſt C. averring him fore debitorem ipſius A. without ſaying, that B. was diſcharged; and upon Non Aſſumpſit there was a Verdict for the Plaintiff

in B. R. and which was afterwards affirmed in the Exchequer Chamber, for being after a Verdict, they held they ought to do what they could to help it; and therefore not taking it as a Promise only on the Part of C. because as such, it could not bind him, unless B. was discharged, they construed it to be a mutual Promise, viz. That C. promised A. to pay the Debt, and in Consideration thereof, A. promised to discharge B.

Butcher *versus* Andrews. 2 Salk. 731. *The Pleadings.*

IN Assumpsit the Case was, the Father was bound by his Promise to pay the Plaintiff so much Money as he should lend the Son, and for such Goods as he (the Plaintiff) should let the Son have, so as the Money lent, and the Goods sold and delivered to him (the Son) did not exceed 5 l. The Action was brought for 5 l. Money lent, and likewise for 5 l. being the Value of the Goods sold and delivered, and likewise for so much Money mutuo dat' & accomodat' to the Son at the Father's Request. Upon Non Assumpsit pleaded, the Plaintiff had a Verdict, and 3 l. Damages: But upon a Motion in Arrest of Judgment, this Verdict was set aside; for 'tis plain, the Defendant would not be indebted for more than 5 l. because he engaged for no more, and if the Jury had given more it had been naught; 'tis true, they gave but 3 l. Damages, but yet that will not help the Declaration, which was for 5 l. Money lent, and for 5 l. the Value of the Goods delivered, and it doth not appear to the Court, but that the Defendant hath paid 5 l. already, and this now claimed is over and above.

1 Salk. 23. Where an Action is brought for more than the Defendant promised to pay, 'tis not good.

Bourkmire *versus* Darnell. Mich. 3 Annæ.

ASsumpsit, &c. In which the Plaintiff declared, That the Defendant in Consideration he (the Plaintiff) at the Instance and Request of the Defendant, would lend and deliver to one Joseph English unum Spadonem of him the said Plaintiff, to ride to Reading in Berkshire; he (the Defendant) Assumpsit, and promised to the Plaintiff, that the said Joseph should redeliver the said Gelding safely to him the Plaintiff. Upon Non Assumpsit pleaded, the Evidence at the Trial was, That the said Joseph English would have hired the Gelding of the Plaintiff, but could not prevail with him till the Defendant came, and did undertake for the Redelivery; upon which the Counsel for the Defendant insisted, that the Plaintiff ought to produce a Note in Writing of this Agreement, which being over-ruled, there was a Verdict for the Plaintiff;

1 Salk 27. Mod. C. 248. Where there is a collateral Undertaking for the Act of another, it must be in Writing. See *antea* Smith *vers.* Westhall.

tiff; and it was moved in Arrest of Judgment, and per Curiam adjudged, That it was void by the * Statute of Frauds, because it was a collateral Undertaking for the Act of another, and in such Case the Statute requires, that it must be in Writing. The Difference is, where the whole Credit is given to the Undertaker, in such Case the third Person is in Nature of a Servant, and there is no Remedy against him; 'tis true, the Undertaking is good, but 'tis not within the Statute, and therefore not requisite it should be in Writing; but where the Undertaker comes in Aid only to procure or obtain Credit for another, so that the Remedy may be against both, this is a collateral Undertaking for another, and made void by the Statute, if 'tis not in Writing. Et per Curiam, In the Principal Case the Plaintiff may maintain an Action of Detinue against Joseph English, upon the Original Delivery of the Gelding; and therefore this Promise, made by the Defendant, was to answer for the Act and Default of another, for which Reason the Verdict was set aside.

* 29 Car. 2. cap. 3.

Hutton *versus* Mansell. Pasch. 3 Annæ.

What shall be a sufficient Evidence of a Promise by Feme-sole to marry.

CASE, &c. by a Feme Sole, in which she declared quod cum she had agreed and promised to marry the Defendant, he in Consideration thereof promised to marry her. Upon Non Assumpsit pleaded, the Cause was tried before Holt, Ch. Just. and the Promise of the Man was proved, but no actual Promise on the Woman's Side, yet he held there was sufficient Evidence to prove that the Woman likewise promised, because she carried her self as one consenting and approving the Promise of the Man.

Savile *versus* Roberts. 10 Will. III. *at* Guildhall, coram Holt *Ch. Just.*

5 Mod. 394, 410.
1 Salk. 13.
Case for causing the Plaintiff to be maliciously indicted, &c. he must prove the Malice and Damages.

CASE for causing and maliciously procuring the Plaintiff to be indicted for a Riot. It was held by Holt, Ch. Just. 'Tis not sufficient, that the Plaintiff prove he was innocent, but he must prove express Malice in the Defendant; he likewise held, that this Action is not grounded upon the Conspiracy, but upon the Damage, and therefore the Plaintiff must prove his Damages, otherwise the Action will not lie: But in a Writ of Conspiracy 'tis otherwise, and where such a Writ is brought, if one is acquitted the other cannot be found guilty.

Sheer *verſus* Brown. Trin. 2 Annæ B. R.

INdebitatus Aſſumpſit, in which the Plaintiff declared, that the Defendant being indebted to him for Goods ſold in ſo much Money, in Conſideration thereof ſuper ſe Aſſumpſit, there was Judgment by Default, and upon a Writ of Error brought it was objected, that the Declaration is ill, becauſe it did not ſet forth, that the Defendant * promiſed, and it might be a Stranger: But per Curiam, it can never be intended, that a Stranger promiſed, or that the Plaintiff himſelf promiſed, and there is no other Perſon in this Record to promiſe, but only the Defendant; 'tis true, if there had been Two or more Defendants, it might have been otherwiſe, becauſe in ſuch Caſe it would have been incertain, which of them had made the Promiſe; and per Gould Juſt. the Difference is alſo between a collateral Promiſe and a Promiſe by Operation of Law: For in the latter Caſe 'tis well, but not in the firſt. See 3 Cro. 913. Noy 50.

Indebitatus Aſſumpſit, and did not ſay, that the Defendant promiſed, held good. * 1 Lev. 164. Raym. 123. Sid. 246.

College of Phiſicians verſus Roſe. Hill. 1703. B. R.

IN a Special Verdict, in an Action on the Caſe, the Jury found, that Roſe the Defendant was an Apothecary, and ſent for by a ſick Perſon (of what Diſtemper non conſtat) that he came to the Patient, and being required to ſend him ſomething in order to his Cure, he accordingly ſent him ſome Bolus's, and this being without any Licence, the Queſtion was, whether it was practiſing as a Phiſician; and per Curiam, it is, for the making up and compounding Medicines is the Buſineſs of an Apothecary, but the Judging what is proper for the Cure, and Adviſing what to take for that Purpoſe, is the Buſineſs of a Phiſician; therefore let the Diſtemper be what it will, the Preſcribing and Adviſing what is fit for it, is the Buſineſs of a Phiſician, tho' without a Fee, but that rarely happens; ſo the Plaintiff had Judgment, but it was reverſed in the Houſe of Peers.

Mod. Caſes 44. The preſcribing what is fit for a Patient is practiſing Phiſick.

Aſhby *verſus* White. Mich. 2 Annæ.

CASE againſt the Conſtables of Ailesbury in Bucks, for obſtructing the Plaintiff to Vote, and for refuſing to receive his Vote at the Election of Burgeſſes for that Borough, to ſerve in Parliament; upon Not guilty pleaded, the Plaintiff had a Verdict, and upon a Motion in Arreſt of Judgment, three Judges held,

1 Salk. 19. Caſe will not lie for hindring the Plaintiff to vote at the Election for a Burgeſs to Parliament.

held, that this Action would not lie till the Parliament had decided, whether the Plaintiff had a Right to Vote as an Elector.

But Holt Ch. Just. was of a contrary Opinion, fl. That the Plaintiff had a Right to Vote, and that in Consequence thereof the Law gives him a Remedy, if he is obstructed, and that this Action is the proper Remedy.

By the Common Law of England, every Commoner hath a Right not to be subjected to Laws made without their Consent, and because such Consent cannot be given by every individual Man in Person, by Reason of Number and Confusion, therefore that Power is lodged in their Representatives, elected and chosen by them for that Purpose, who are either Knights, Citizens, or Burgesses.

That the Election of Knights of Shires is by Freeholders, and this is a Right which they have in respect of their Freeholds, arising from and inseparately incident to such Freeholds; for before the Statute of H. 7. every Freeholder, tho' of never so small a Value, had a Right to Vote at such Elections; and tho' this was confined by that Statute to Freeholds of a certain Value, yet 'tis still a Right, as it was at Common Law, and annexed to the Estate, and therefore 'tis a real Right or Franchise.

As to Boroughs, some are not incorporate, but are so by Prescription, and their Representatives are chosen by Burgesses, who vote ratione Burgagii & ratione tenuræ, and this like the Case of a Freeholder before-mentioned is a real Right annexed to the Tenure in Burgage.

In other Boroughs which are incorporated and subsist by Charter, the Right of Election is a personal Right granted to the Corporation, for the Use and Benefit of the Members thereof; for tho' in Point of Prender it vests in the Corporation only as an Inheritance; yet quoad the Exercise and Enjoyment, 'tis distributively the personal Right of every individual Member of the corporate Body, for they are Persons who are represented, and therefore they are to pay the Wages to the Person whom they choose; and if they refuse, 'tis to be levied upon the respective Members of the Corporation.

And as this is a personal Right, so it cannot be given but to a corporate Body; and tho' my * Lord Hobart would have it good in a Place incorporate, and this by Way of Ordinance, yet that is not Law, and all the other Judges were against him.

* 12 Rep. 120.

The Right of Citizens to vote for their Representatives is of the same Nature, and built upon the same Foundation, and no wise different but in Point of Eminence, as Cities are more worthy and eminent than Boroughs.

This is a noble Franchise and Right, and therefore not without a Remedy where 'tis opposed, for Want of Remedy and Want of Right are Convertibles.

Harecourt *verſus* Haſtings. Paſch. 4 Will. III.

IN an Action on the Caſe for Fees and Wages, the Defendant pleaded in Abatement, Et petit judicium de Billa, & quod Billa prædicta caſſetur, for Incertainties in the Declaration, and inſiſted upon many Errors therein: Sed per Curiam, it ſhall not be allowed for the Defendant to take Advantage of any Errors in the Declaration upon a Plea in Abatement, but he ought to demur, for he was ruled to anſwer over.

No Advantage ſhall be taken to a Declaration upon a Plea in Abatement, the Defendant ought to demur.

Caſe, &c. againſt a Taylor, in which the Plaintiff declared, that he (the Plaintiff) employed him to make a Coat, and that he made it tam inepte & inartificiliater, that it was of no Uſe to him; upon a Demurrer to this Declaration it was held naught, becauſe non conſtat, wherein it was ſpoiled.

1 Vent. 260, 269.

Caſe, in which the Plaintiff declared, that he being ſeiſed of ſuch a Cloſe, had a Way, &c. and that the Defendant ſtopped it, adjudged good, becauſe Poſſeſſion is a good Title againſt a Wrong-doer.

Caſe againſt a Carrier, and declares for four ſilver Cups & uno poculo argenteo, and not uno alio poculo, &c. adjudged good; for if it be aliud, the Damages ſhall be intended to be given for it; if it be idem & non aliud, then 'tis only Tautology, and in that Caſe the Damages may be rightly given.

2 Vent. 78.

Brooks *verſus* Hayne.

THE Plaintiff, who was an Attorney, was employed by T. S. who made the Defendant his Executor, and died, and afterwards the Plaintiff brought an Aſſumpſit againſt this Executor for ſeveral Fees, and for ſo much Money laid out in proſecuting and defending ſeveral Suits at Law for the Teſtator; and ſets forth, that he had demanded the Money of the Teſtator in his Life-time, and of the Executor ſince his Death, and that neither the one nor the other had paid it, &c. The Defendant pleaded the Statute * 3 Jac. and that the Plaintiff had not given the Teſtator, or to this Defendant, any Bill of Charges, according to that Statute, before the Action brought; and upon a Demurrer to this Plea, per Curiam, it was adjudged a good Plea.

Raym. 245. The Defendant pleaded the Statute 3 Jac. againſt an Action brought by an Attorney, that he had not given a Bill of Charges, and good.

* Cap. 7.

ADDITION.

1 Bulſt. 296. 2 Cro. 183. Noy 32. 2 Leon. 183.

AN Addition after the alias dictas is ill; as for Inſtance, where the Indictment was againſt W. R. alias dictus W. R. de H. for this is no Addition.

For where the Præcipe was Richardo Joyner, civi & pannario London, alias dictus Richardus Joyner de London Armiger, adjudged, that without the alias dictus, there was no Addition of the Will; and that if the Party is not ſufficiently named in the firſt Part of the Writ, the Alias cannot Aid or help it, becauſe 'tis only to make the Writ agree with the Deed, but is not material, for 'tis neither anſwerable, traverſable, or iſſuable.

Et per Holt Ch. Juſt. If W. R. of Wilts, commit Felony at Weſtminſter, he is always indicted by the Name of W. R. de Weſtmonaſt. and the Practice being always ſo, this may properly be ſaid to be his Addition.

Debt againſt W. R. de H. Yeoman, alias dictus W. R. de H. Son and Heir of R. R. and ſo charges him as Heir; this was adjudged ill, becauſe the Writ doth not name him Heir in the Premiſſes, but in the Alias dictus.

Cro. Eliz. 334.

Treſpaſs againſt W. R. de H. Chandler, the Defendant pleaded in Abatement, that he was a Gentleman; and upon a Demurrer to this Plea it was adjudged ill, becauſe he did not deny that he was a Chandler; and if a Gentleman exerciſe a Trade, he may be called by the Name of his Trade, tho' he is a Gentleman.

The Earl of Banbury *verſus* Wood.

1 Salk. 5. Addition not neceſſary in a *Homine Replegiando.*

IN a Homine replegiando, the Defendant pleaded in Abatement, there was no Addition of Will or Place of Abode in the Writ, &c. and upon a Demurrer to this Plea, he was ruled to anſwer over; for, per Curiam, an Addition is not neceſſary, becauſe the Pluries Replevin, upon which the Court holds Plea, is not the original Writ, but the original Writ is Vicontiel, and no Proceſs of Outlawry lies upon it, and therefore 'tis not within the Statute; alſo ſince there is no Addition in the firſt Writ, there muſt be none in the Pluries, for that muſt not vary but purſue the firſt Writ on which it was founded; and tho' the Statute of H. 5. ſays, there ſhall be an Addition in all original Writs where Exigent lies, yet that muſt be intended where Proceedings are upon the firſt Writ.

ADMINISTRATION.

ADjudged, that Administration of the Goods of a Feme Covert ought to be granted to the Husband, for he is the next and nearest Friend; the Care of the Funeral belongs to him, and he might have recovered or released whatever belonged to her. To whom grantable.

But if the Wife was an Executrix to another, then, as to the Goods which she had in that Capacity, Administration must be granted to the next of Kin to the Testator. 4 Rep. 51. Jones 175.

Where there is a Brother and Sister of the Half-Blood, Administration may be granted to the Sister, because she is in equal Degree of Kindred; but if the Sister is married, then it must be granted to the Brother, and not to her and her Husband, because in effect it makes the Husband Administrator, who is not of Kin to the Intestate, and if she die the Husband would still continue Administrator, and so might possess himself of the whole personal Estate, which is contrary to the * Statute. Allen 36. Stiles 45, 74. * 21 H. 8.

Where an Executor refuses or dies before Probate, Administration shall be granted to the next of Kin of the Intestate cum Testamento annex', unless there is a Residuary Legatee, and then it must be granted to him.

The Husband made his Wife Executrix, and gave her the Residue of his moveable Goods and Chattels; now if the Wife die before Probate, Administration must be granted to the next of Kin to the Husband, because the whole Residuum was not given to the Wife; but if the Whole had been given to her (viz.) All his Debts, Goods and Chattels whatsoever, then Administration might be granted to the next of Kin of the Wife, because she was made a Residuary Legatee of the whole. Jones 125.

At Common Law the Ordinary might Repeal an Administration at Pleasure; but now since the Statute 21 H. 8. when once 'tis duly granted according to that Statute, it cannot be repealed, for his Power is then executed; but if 'tis not duly granted according to the Statute, as for Instance, if granted to a wrong Person, in such Case he may repeal it and grant it to another, for he hath not executed his Power. Sed nota, If the Administration is repealed for Want of Form in the Grant, in such Case the Ordinary must regrant it to the same Person, tho' there are others in equal Degree. Repeal. Sid. 372, 179. Jones 262. Raym. 43. 1 Mod. 230.

Where

3 Cro. 460. Raym. 224. Vent. 303.

Where an Administration is repealed, because it should be granted to another, in such Case all Acts of the first Administrator stand good; but if it is repealed because there is a lawful Executor, then all his Acts are void.

Where a Will is of Lands and Goods, the Court may repeal upon an Appeal; but where 'tis of Lands only they cannot, because there they had no Authority to prove, and by Consequence had no Authority to repeal.

Sir Geo. Sands's *Case*.

Raym. 93. Sid. 179, 403. Where the Ordinary hath a Power and executes it, it shall not be repealed.

SIR Geo. Sands administred to his Son, and afterwards a Woman pretending to be his Wife, sued for a Repeal, but a Prohibition was granted, because the Ordinary had an Election to grant it either to the Father or Wife, and had executed his Power by granting it to the Father, per Holt Ch. Just.

But where a Feme Covert died intestate, and the next of Kin to her obtained Administration, and the Husband sued for a Repeal, a Prohibition was denied per Holt Ch. Just. because in this Case the Ordinary had no Power or Election to grant it to any Person but to the Husband; and this is not within the Statute of H. 8. but within the Statute of Ed. 3.

Of pleading *Plene administravit.*

Upon this Issue the Defendant cannot give in Evidence a Judgment not satisfied, because 'tis an Administration of another Nature than he had pleaded.

Payment of Debts pendente Brevi is no Evidence upon this Issue, for the Plea is Plene administravit in the præter-Tense, and this Evidence proves an Administration only since the Purchase of the Writ, and therefore the Defendant must plead it Specially.

Allen 47. 3 Cro. 570. contra.

In a Scire facias, upon a Judgment against the Testator, if the Defendant plead Plene administravit, 'tis ill upon a special Demurrer, because by the Plea the Defendant admits that Goods came to his Hands, and therefore he ought to shew how he administred, that it may appear it was not in paying of Debts of an inferior Nature, and this is in Favour of Judgments; but upon a general Demurrer such a Plea may be good, because the Defendant might have paid other Judgments, and so shall his Plea (which is confessed by the Demurrer) be intended.

Moor 858.

Nota, The proper Plea in this Case is Riens inter maines at the Time of the Testator's Death.

Slater *verſus* May. Mich. 3 Annæ B. R.

A Adminiſtrator, durante abſentia W. R. Executor, brought an Action of Debt upon a Bond, but did not aver where W. R. was abſent, or that he was abſent; per Curiam, 'tis reaſonable the Ordinary ſhould have Power to grant Adminiſtration in this Caſe, and ſuch Adminiſtrator is accountable to the Executor, and we will intend him beyond Sea, but Abſence ſhould have been averred in this Caſe.

Action by an Adminiſtrator, during the Abſence of the Executor, he muſt aver, the Executor is abſent.

ADMIRALTY.

Anonimus. Hill. 13 Will. III.

UPON a Prohibition to a Suit in the Admiralty for Mariners Wages, it was held per Holt, Ch. Juſt. That if a Ship is * loſt before ſhe arrives to any Port of Delivery, the Seamen looſe all their Wages, but if ſhe is loſt after ſhe comes to a Port of Delivery, then they only looſe their Wages from the laſt Port of Delivery; but if they run away, tho' after they come to a Port of Delivery, they looſe all their Wages.

Seamen looſe their Wages where the Ship is loſt before ſhe comes to a Port.
* Sid. 129.

King *verſus* Perry. Paſch. 1 Will. III.

PER Holt, Ch. Juſt. an Obligation taken in the Admiralty to appear and ſue there, is ſueable in that Court, for 'tis a Stipulation in Nature of Bail at Common Law: But where there were 13 Part Owners of a Ship, and one of them refuſed to let her go to Sea, whereupon a Stipulation was taken for the Share of the Party refuſing, and afterwards the Ship went her Voyage, and this Stipulation being put in Suit in the Court, a Prohibition was granted, becauſe the Building the Ship and the Charter Party were at Land.

Where an Obligation is ſueable in the Admiralty, and where not.

Ad-

Hob. 12. Moor 918. Where a Maſter may pawn a Ship, and were not.

Adjudged, that where a Maſter pawns the Ship at Sea, the Admiralty hath a Juriſdiction; and nota, he may pawn to relieve the Ship in Extremity, for he being conſtituted Maſter of the Ship, hath implicitly a Power to preſerve it in Caſes of Danger, but he cannot pawn it for his own Debt, becauſe he has neither a Property or Power for that Purpoſe; and if the Admiralty ſhould confirm an Hypothecation of that Nature, a Prohibition ſhall be granted.

Hob. 212.

If a Man give Bond at Sea for a Debt contracted at Land, the Admiralty have no Juriſdiction, for one Thing muſt not only be done at Sea, but the whole muſt concur to give them Juriſdiction; ſo if a Debt is contracted at Sea, and a Bond given for that Debt at Land, ſo if there be a Contract at Land and a Breach at Sea, in theſe and the like Caſes the Common Law ſhall be preferred.

ADVOWSON.

The King verſus *Biſhop of* Cheſter, & al'.

2 Salk. 560. 5 Mod. 297. Where an Advowſon is in Groſs, and where 'tis appendant again.

IN a Quare Impedit, &c. it was held by Holt, Ch. Juſt. to which the Court agreed, that where an Adwowſon is appendant to a Manor, and the Owner mortgages the Manor in Fee, excepting the Advowſon, that by this Means 'tis become in Groſs; but if the Money be paid punctually at the Day, then 'tis become appendant again, and if 'tis paid after the Day, 'tis appendant in Reputation, and may paſs by the Name of an Advowſon appendant in a Grant or other Conveyance, tho' in Reality the Appendancy is deſtroyed; for if 'tis ſevered one Inſtant from the Manor, by the Act of the Party, 'tis then in Groſs, and not appendant.

So where the Owner of a Manor, to which an Advowſon was appendant, accepts a Fine of the Advowſon, with a Grant and Render back of every ſecond Turn, now for ſuch Turn the Advowſon is in Groſs, but for other Turns the Appendancy ſtill continues; But if a Man levy a Fine of the Advowſon, and accepts a Grant and Render of every other Turn, the Appendancy is quite

gone, becauſe there was an Inſtant of Time in which it became ſevered.

So where there are two Coparceners of a Manor, to which an Advowſon is appendant, and they make Partition of the Manor, without taking Notice of the Advowſon, at every other Turn 'tis ſtill Appendant; but if there had been any expreſs Exception of the Advowſon, it would then be in Groſs.

Reynolds *verſus* Blake. Paſch. 9 Will. III. in C. B.

IN a Quare Impedit, it was the Opinion of the Court, That where there are two Coparceners of a Manor, to which an Advowſon is appendant, and the whole Demeſnes are allotted to one, and the Services to another, by this Means the Manor is deſtroyed, and the Advowſon becomes in Groſs; but if one of them die without Iſſue, ſo that the Demeſnes deſcend to him who hath the Services, the Manor is now revived, and the Advowſon is appendant again, becauſe this was a Severance by Act of Law. See 17 Ed. 3. 38. 12 H. 7. 5. 8 Rep. 79. 1 Inſt. 122. Bro. Quare Imp. 118.

Poſtea Tit. Appertaining, S. C. Where an Advowſon appendant to a Manor is become in Groſs.

ALEHOUSES.

Anonymus.

THE Defendant was indicted for keeping a Tippling Houſe, without Licenſe, contra formam Statut': Upon Not guilty pleaded, he was found guilty; and it was inſiſted in Arreſt of Judgment, that at Common Law any Perſon might keep an Alehouſe in a fit and convenient Place for that Purpoſe, that this was a ſtatutable Offence, and the Penalty by the Statute is, that the Offender ſhall be committed by two Juſtices, and a Recognizance taken of him, with two Sureties, not to ſell Ale, &c. and that this being the Puniſhment by the Statute, for that Reaſon * an Indictment will not lie; and the

An Indictment will not lie where a Statute creates an Offence, and appoints the Puniſhment. Poſtea the King v. Edwards that it will not lie. * Palm. 388. 2 Roll. Rep. 398. 2 Cro. 643

Court being of this Opinion, Judgment was ſtaid, tho' an expreſs * Caſe was cited to the contrary.

* 1 Mod 34.

Stephen Watſon's *Caſe.* Mich. 13 Will. III.

† 1 Salk. 45.

THE ſame Point came in Queſtion again in Stephen Watſon's Caſe, which is imperfectly reported in † 1 Salk. by the Name of Stephens verſus Watkins. The Caſe was thus:

Stephen Watkins was indicted at the Quarter-Seſſions, for that he, on the firſt Day of October, Anno 10 Will. 3. and at divers other Days and Times at B. &c. without any Licence from two Juſtices of the Peace, did keep an Alehouſe, and ſold Ale and Beer there contra pacem & contra formam Statut'; upon a Demurrer to this Indictment it was inſiſted,

1. That an Indictment would not lie in this Caſe.
2. That admitting it would lie, yet not at the Seſſions.
3. But admitting that it would lie, and at the Seſſions, yet this Indictment is ill in Form.

* Cap. 25.
† Cap. 3.

First, This Indictment muſt be either upon the Statute * 5 & 6 Ed. 6. or upon the Statute † 3 Car. 1. and both theſe Statutes preſcribe another Method of puniſhing this Offence, which was made ſo by one or both of them, and that ** Method and no other muſt be followed, and if ſo, then an Indictment will not lie.

** 2 Cro. 643. *Caſtle's* Caſe. 1 Roll. Rep. 390.

(2. Point.) But admitting it will lie, yet not at the Seſſions; for this is not an Indictment upon the Statute 4 Jac. 1. cap. 4. for ſelling Ale by the Barrel without Licence, for in that Caſe, by the very Words of the Statute, an Indictment will lie at the Seſſions; but this is an Indictment upon one of the Statutes before mentioned, and neither of them give the Seſſions any Power in this Caſe, and they have no Power, but what is expreſly given them by Statute.

(3. Point.) But this Indictment is naught in Form, for the Caption is, that it was preſented by the Oath of twelve Men ſworn and charged, without ſaying, †† adtunc & ibidem jurat' & onerat', and thereupon it was adjourned; but afterwards, in Mich. 13 Will. 3. it was adjudged, that this Indictment would not lie, becauſe it was a new Offence created by Statute, and a particular Method of puniſhing the Offender was appointed by the Statute, which ſhould be followed, and no other.

†† 1 Vent. 60.

The King verſus Randall.

THere is a ſhort Note of this Caſe in 2 Salk. but the Caſe was as followeth, (viz.) two Orders were removed by Certiorari into B. R. which Orders were made at the Seſſions in Middleſex, the firſt whereof recites, that whereas R. Randall had lately taken an Houſe at Hogſden, deſigning to ſell Ale and Beer there; and whereas the Houſe had never been inhabited by other Perſons than Merchants and Perſons of Quality, and there were Alehouſes enough in Hogſden already, therefore 'tis ordered, that no Licence be granted to any Houſe there, wherein Ale was not formerly ſold; and that no Licence ſhould be given to Randall; the other recites, that whereas a Licence was ſurreptitiouſly obtained by Randall from Two Juſtices, to ſell Ale there, &c. that yet he ſhould be ſuppreſſed, &c. from drawing Ale there, &c. and now it was moved to quaſh theſe Orders, becauſe by the Statute 5 & 6 Ed. 6. the Quarter-Seſſions cannot controul the Authority of two Juſtices in this Matter: Et per Holt Ch. Juſt. This Difference hath been taken, (viz) where an Authority is given to two Juſtices to do a Thing, and from which there lies no Appeal, there it may be commenced and done in the Seſſions; but if an Appeal is given, then the Seſſions hath not an original Juriſdiction, it muſt not be begun there; as for Inſtance per 18 Eliz. and 43 Eliz. till the Statute 3 Car. 1. But here the Queſtion is, whether the Seſſions can ſuppreſs an Alehouſe licenſed by two Juſtices of Peace, and adjudged they could not, except 'tis for Diſorders committed, and thereupon theſe Orders were quaſhed.

2 Salk. 470. Seſſions can't ſuppreſs an Alehouſe licenſed by two Juſtices, unleſs 'tis for Diſorder.

5 & 6 Ed. 6. cap. 25.

The King verſus Edwards.

THE Queſtion * whether an Indictment would lie for ſelling Ale without a Licence, was again ſtirred, notwithſtanding the Reſolution in Stephen Watkins's Caſe before-mentioned; and two Judges were of Opinion that it would not lie; but per Holt Ch. Juſt. an Indictment is more beneficial for the Subject, becauſe 'tis a ſummary Way of Proceeding, and therefore it ſeems reaſonable that it ſhould lie in this Caſe, notwithſtanding 'tis an Offence created by the Statute, and a particular Puniſhment thereby directed; and ſo it hath been adjudged in a parallel Caſe; as for * Inſtance, 'tis prohibited by the Statute 22 Car. 2. to travel with a Waggon drawn with more than five Horſes at length; this is a new Law, and 'tis a new Offence to tranſgreſs it; but yet an Indictment will lie againſt the Offender, tho'

* Mod. Caſes 86.

Ante Stephen Watſon's Caſe.

* 4 Mod. 144.

tho' a particular Punishment is directed by that very Statute which created the Offence.

ALIEN. *See* Descent *per totum*. *See* Trial 2.

Progers *versus* Arthur. Pasch. 5 Will. III. B. R. Rot. 531.

When a Traverse makes Issue too streight.

INdebitatus Assumpsit, the Defendant pleaded, that the Plaintiff was an Alien Enemy, born at Roan in France, under the Allegiance of, &c. The Plaintiff replied, that he was born at Hamburgh, under the Allegiance of the Emperor, a Friend of the King, &c. and traversed, that he was born at Roan in France, &c. to which Replication the Defendant demurred, and had Judgment, because by the Traverse Roan is Parcel of the Issue, which is very immaterial, it being too streight; and instead thereof the Plaintiff should have traversed, that he was born under the Allegiance of the French King: Nota tamen, in a Case between Grodeck and Briggs, which was Debt for an Escape, the Defendant pleaded, that the Plaintiff was an Alien Enemy, born at Roan in France, under the Allegiance of the French King, &c. and the Plaintiff replied, that he was a natural Subject, born at Westminster in the County of Middlesex; and traversed that he was born in France; and upon Demurrer the Court held this to be an immaterial Traverse, for the Plaintiff should have rested, and tendered an Issue upon his being born at Westminster.

Jones 261.

The Capacity of an Alien may be considered, either in Reference to Inheritances and to Freeholds, or to Goods and Chattels, as to Inheritances, &c. an Alien may purchase by his own Account or Contract, tho' he cannot retain against the King, but he cannot take a Freehold by Action in Law, therefore he cannot be a Tenant by the Courtesy; nor an Alien Woman be Tenant in Dower; for the Law doth nothing in vain, therefore it will

1 Vent. 417.

not give him or her a Freehold in the Causes before-mentioned, because they cannot keep it.

Chattels are either real or personal, now an Alien is not capable of a Chattel real; as for Instance of a Lease of Lands, but an Alien Merchant may take a Lease of an House to dwell in, as incident to Trade and Commerce, but he is not capable of Chattels personal. Hob. 148. 1 And. 20. Goldſ. 29. 1 Leon. 47. 4 Leon. 82. Sid. 417.

At Common Law, a Lease made to an Alien Artificer, either of an House or Shop, was good between the Parties, but forfeitable to the King; but now, if a * Shop is let to an Alien Artificer, the Lease is void by the Statute 32 H. 8. and if the Lessor brings an Action of Debt for Rent, the Lessee may plead this Statute in Bar to the Action; but if an House or Shop is let to an Alien Gentleman, the Lease is not void within that Statute, neither is it pleadable in Bar to an Action. * 1 Sand. 7. Sid. 308.

AMENDMENT. *See* Variance.

AMendments are usually made in Affirmance of Judgments, and seldom or never to reverse or destroy them:

By the Statute of * Marlbridge, 'tis enacted, that De cætero fines non capiantur pro pulchre placitando, (i. e.) for Leave to amend vitious and bad Pleading, &c. from which it may be observed, that there were Amendments at Common Law, but then the Party was to pay a Fine for Leave to amend, like a Fine pro licentia concordandi; for he was to be amerced for ill Pleading, which Amercement was due to the King; and that being now taken away by this Statute, it seems reasonable that the Party should pay Costs upon an Amendment. * cap. 11.

There are but two Statutes of Amendments (viz.) 14 Ed. 3. and 8 H. 6. the one extends to Process out of the Roll, (i. e.) to Writs which issue out of the Record, and not to Proceedings on the Roll it self; and this last Statute hath always been construed in Imitation of the first, the Intent of it being to amend in Matters precedent to the Judgment, and to support the Judgment it self, and to avoid Writs of Error.

The Statute 16 & 17 Car. 2. is in the Nature of a Statute of Jeofailes; it extends only to superior Courts, and to the Courts

Courts of Counties Palatine, and that only after Verdict, unleſs in ſome particular Caſes; by this Statute all Defects are amendable after Verdict, which do not alter the Merits of the Cauſe, nor the Nature of the Trial and Iſſue.

Therefore where the Matter of the Suit is not actionable, the Judgment ſhall be arreſted; ſo likewiſe where there is a Cauſe of Suit, but the Plaintiff hath took a wrong Remedy; as for Inſtance, if he bring an Action on the Caſe for Words, which are not actionable; if he bring an Action of Debt upon a Bond before it is due, or Debt for Rent before 'tis in Arrear; ſo if he bring Covenant, and doth not aſſign a ſufficient Breach, or Aſſumpſit, and doth not ſhew a ſufficient Conſideration, theſe are not helped by the Verdict.

At Common Law original Writs were not amendable, becauſe coming out of another Court, they are not ſubject to be corrected by B. R. but in the Caſe of the King, they might be amended in Chancery.

But now by the Statute 8 H. 6. the Court may amend any Fault in an original or judicial Writ, if 'tis the Miſpriſion of the Clerk.

8 Rep. 156. *Blackmore's* Caſe. Thus if the Curſitor hath Inſtructions to make out a Writ againſt W. R. generoſum, and inſtead of that he Names him Militem, this Miſtake is amendable, for it muſt be imputed to his Hob. 129. Negligence or Overſight: But if he is named Generoſus in the Original, when it ſhould be Miles, and the Curſitor had no ſuch Direction, this cannot be amended, becauſe 'tis not his Fault, but the Neglect of true Information by the Party himſelf.

8 Rep. 159. If an Original is Præcipe quod ſolvit, inſtead of Præcipe quod reddat, or Hos breve for Hoc breve, 'tis not amendable by the Statute 8 H. 6. becauſe this muſt be imputed to the Ignorance of the Curſitor; it makes the Writ without due Form which is required by Law, for forma dat eſſe rei, and prevents Confuſion.

2 Saund. 39. 2 Vent. 171. * 2 Vent. 173. 4 Rep. 44. But by the later Authorities, falſe Latin is amendable, as in Waſte, if the Writ is * deſtrictio inſtead of deſtructio, ſo Hos breve for Hoc breve, or Debet for Debeant.

Sid. 379, 421. So Debt in the Debet when it ſhould be in the Detinet, per Stat. 16 Car. 2. amendable, and Want of Pledges in a Suit by Original, becauſe 'tis only Matter of Form, by which neither the Right of the Cauſe or the Nature of the Trial is altered; the like where the Suit is by Bill.

The Omiſſion of Vi & Armis & contra pacem was formally held fatal, even after a Verdict, for it was held to be Matter of Subſtance, becauſe it brings a Fine to the King, but now 'tis amend- * 2 Saund. 308, 402. able by the laſt Statute; ſo is the Omiſſion of a * profert hic in Curia after a Verdict, but not upon a Demurrer.

Sid. 70, 143. And by the ſame Statute an Omiſſion of a Capiatur or Miſericordia ſhall be amended, and ſo 'tis if a Capiatur be entered inſtead

ſtead of a Miſericordia; ſo where an Action is brought by Thomas, and the Judgment was Quod Johannes recuperet, this is amendable, for the Miſtake is only of the Name, which before was right in the Record; and by the Statute, no Fault ſhall impart the Judgment which doth not affect the Merits of the Cauſe, or the Right of the Party.

Greenwood *verſus* Piggott. Trin. 7. Will. III. B. R.

TRespaſs for an Aſſault and Battery; the Defendant pleaded Son aſſault demeſne, the Plaintiff replies, De ſon tort demeſne abſque tali cauſa & de hoc ponit ſe ſuper patriam & predict' * Edwardus (which was the Plaintiff's Name) ſimiliter, when it ſhould have been the Defendant's Name; the Original, the Iſſue and the Niſi prius Roll, had both this Miſtake, but the Plea Roll was right. Adjudged, that it ſhould be amended.

Where the Niſi prius Roll ſhall be amended by the Plea Roll.

* 3 Cro. 435. 8 Rep. 161. 2 Cro. 444, 587, 157, 627.

Sanders *verſus* Lenoir. Mich. 1 Annæ B. R.

IN a Writ of Error, upon a Judgment in the Court at Northampton, the Record removed being Præceptum fuit, inſtead of præceptum eſt, in the Venire, and Meſſes inſtead of Miſis; the Draught below was right, it being drawn by the Clerk and peruſed by Counſel; and now upon a Motion to amend the Record by the Draught (which the Clerk ſwore to be Right below) it was denied, becauſe it was no more than a private Paper in their own Cuſtody, of which this Court could not take any Notice; and if this was done by Contrivance (as alledged) the Defendant might bring his Action.

A Record ſhall not be amended by the Draught below.

Anonymus. Paſch. 7 Will. III.

RUled, That whilſt the Declaration is in Paper, the Court may give leave to amend any Thing in it at Pleaſure, becauſe in ſuch Caſe 'tis not within the Statutes of Amendments; but when once it comes in Parchment the Court can give Leave to amend no farther than is allowed by the Statute, for 'tis then a Record, and ought not to be raſh'd or obliterated.

Whilſt all is in Paper 'tis not within the Statutes of Amendments.

Nota, After a Demurrer only given, but not joined, the Party cannot amend without Leave of the Court.

Where

Where the Roll varies from the Original, the Roll might be amended at Common Law at any Time; for the Original is a Record of itself, and the Entry of it on the Roll is only Ex abundanti, tho' the Usage is to enter it.

3 Rep. 157. So during the Term, the Court might amend any Mistake in the Roll at Common Law, for the Roll is only the Remembrance of the Court during the Term.

But at the Common Law after the Term, the Court could not amend any Fault in the Roll, for then the Record is not in the Breast of the Court, but in the Roll itself.

Williams *versus* Hoskins. Mich. 3 Annæ B. R.

1 Salk. 52. By the Name of *Buckſome* v. *Hoskins.* Mod. Caſes, 263, 310. See Cro. El. 760. Cro. Car. 162. 1 Roll. 197, 797. 2 Cro. 372. which *per Holt*, Ch. Juſt. is a hard Strain. Sid. 7. 12.

THE Plaintiff obtained Judgment in Ejectment for two Houſes, and brought a Scire Facias on that Judgment, to ſhew Cauſe why he ſhould not have Execution of one Houſe; the Defendant pleaded Nul tiel Record, and the Plaintiff perceiving the Fault, moved to amend it. Sed per Curiam, This Scire facias is a good Writ, there is no fault in it to amend, and the Court will not alter it to fit it for the Plaintiff's Purpoſe in this Judgment, when 'tis probable there may be another Judgment in Ejectment for one Houſe, and the Defendant having taken Advantage of it, it ſhall not be amended to falſifie his Plea.

AMERCIAMENTS and FINES.

AMongſt the Antients all Puniſhments were Pecuniary, from whence the Latines properly ſay, Solvere pœnas; but in Proceſs of Time this Sort of Puniſhment became contemptible, and then for ſome Crimes Death enſued.

Bracton 129. All Amerciaments and Fines belong to the King, thus Fines upon Original Writ, and Fines pro licentia concordandi, and the Reaſon is, becauſe the Courts of Juſtice are ſupported at his Charge; and wherever the Law puts the King to any Charge,

for the Support and Protection of the People, it provides Money for that Purpose, and this is called, Vectigal Judiciarium.

An Amerciament is ordered by the Court, but affered by the Jury, and a Fine is not only ordered, but assessed by the Court; and as for these Amerciaments, which are ordered and assessed by the Court, upon Officers, who are in Contempt, or in Default of their Duty, these seem to be rather Fines than Amerciaments, tho' they are commonly so called; and yet it hath been held, that where a Pecuniary Penalty is assessed by the Court upon an Officer, 'tis properly an Amerciament, but when on a Stranger, 'tis a Fine. 8 Rep. 40.

Where the Defendant is found guilty of a Misdemeanor upon Indictment, and Fined, he cannot move to mitigate the Fine unless he appear in Person; but he may be fined tho' absent. 1 Vent. 209, 270.

Wherever a Fine and Ransom is mentioned in a Statute, the Word Ransom imports a Sum treble to the Fine, tho' my Lord Coke in his Littleton tells us 'tis the same Thing. Dyer 232. a. 1 Inst. 127.

Where a Statute imposes a Fine at the Will and Pleasure of the King, that must be intended, of his Judges, for 'tis by them the Fine is imposed. 4 Inst. 71.

Where a Statute imposes a Fine certain upon any Conviction, the Court cannot mitigate it; but if the Party come in before the Conviction and submits himself to the Court, they may assess a less Fine, for he is not convicted, and perhaps never might.

But tho' the Fine is certain, yet the Court of Exchequer may mitigate it, because 'tis a Court of Equity, and they have a Privy Seal for it. 1 Roll. Rep. 194. *Wray's* Case.

At a Court-Leet the Steward told W. R. he was a Resiant, who replied, he lied, thereupon the Steward fined him 20 l. and adjudged good without a Prescription so to do, and Debt lies for this Fine. But if he Fine the Jury for a Contempt, he must Fine them severally, for the Contempt of one is not the Contempt of the other. 1 Roll. Rep. 32. Cro. Eliz. 581.

ANTIENT DEMESNE.

Hunt *verſus* Browne. Hill. 1 Annæ.

1 Salk. 57, 144. 1 Lutw. Where a Recovery, ſuffered in a Court of Antient Demeſne with double Voucher, is a good Bar to an Eſtate Tail.

THIS Caſe is put at large in 1 Lutw. and in arguing it Holt, Ch. Juſt. held, That a Recovery in Antient Demeſne with double Voucher, is a Bar to an Eſtate-tail, as it is in the Court of Common Pleas, for a good Foundation of ſuch a Cuſtom muſt be ſuppoſed, and 'tis that which hath given this Conveyance ſuch Effect and Operation; ſo likewiſe a Recovery by Default in that Court is a Diſcontinuance, as 'tis in the Common Pleas, and a Fine likewiſe is a Diſcontinuance, but no Bar, and as to that Point 'tis not material, whether the Court is a Court of Record or not; for if the Action ſued there will recover a Freehold, the Diſcontinuance is a neceſſary Effect of ſuch a Recovery, for every Recovery recovereth a Fee-ſimple, and every Recovery of a Fee-ſimple works a Diſcontinuance, and therefore a Fine levied in this Court (if 'tis a Fine) muſt be of the ſame Conſequence and Effect as other Fines are, and certainly a Fine may be levied of Lands in Antient Demeſne, in the Court of the Lord of the Manor, upon a Writ of Right Cloſe, for 'tis agreeable to the Power of that Court in other Inſtances; as for Example, that Court may try the Miſe joined upon a Writ of Right, which hath the ſame Effect upon a Non-claim as a Fine hath; and the Tenants of ſuch Lands would be under this great Diſadvantage, that no Fine at all would be levied of their Lands, if it might not be levied in that Court, but their Privileges can never be intended to be to their Diſadvantage: To all which the Court agreed.

Kite *verſus* Laury. Hill. 7 Will. III. B. R.

1 Salk. 56. By the Name of *Barker* v. *Wich*. 'Tis the Tenure that is traverſable, and not the being pleadable in the Lord's Court.

IN Ejectment the Defendant pleaded, that the Manor of Bray is Antient Demeſne, and that the Lands in Queſtion are held of the ſaid Manor, and pleadable by Writ of Right Cloſe in the Court of the Lord of the Manor. The Plaintiff replied, that the Lands were in the Pariſh of Bray, and

and were Frank-Fee and pleadable at Common Law, and traverſed, that they were pleadable in the Court of the Manor; and upon a Demurrer to this Replication it was argued, that the Precedents were otherwiſe, for 'tis the Tenure, and not its being pleadable in the Court of the Manor, which is traverſable; for that is but a Conſequence of the Tenure, to which the Court inclined, ſaying, that where Antient Demeſne is pleaded, in ſuch Caſe the Party (to make a full Defence) muſt either take Iſſue upon it, or traverſe the Tenure of the Manor, or that there was a Fine levied, or Common Recovery ſuffered, and ſo rely upon the Eſtoppel, and pray Judgment, whether he ſhall anſwer to it as Antient Demeſne, contrary to ſuch Fine or Recovery: And Note, That where Antient Demeſne is pleaded, the Defendant muſt alledge, that the Lands are held of ſuch Manor which is Antient Demeſne, and not that they are Parcel of ſuch a Manor which is Antient Demeſne.

Zouch *verſus* Thompſon. Mich. 9 Will. III. C. B.

A Fine being levied of Lands in Antient Demeſne, the Lord brought a Writ of Diſceit againſt the Tertenant, and againſt the Heirs of the Cogniſee and the Heir of the Cogniſor, ſeven Years after the Fine had been levied; and declared generally, that he was Lord of the Manor at the Time of the Fine levied, and yet is Lord thereof, without ſhewing any Eſtate ſpecially; and in this Caſe theſe Points were reſolved, (1.) That a Writ of Deceit lies againſt the Cogniſee himſelf as well as againſt the Cogniſor, becauſe he is a Party to that Fine which works a Wrong and Prejudice to the Lord of the Manor. (2.) That this Writ lies againſt the Heir of the Cogniſor or Cogniſee, becauſe the Fine worked a real Deceit and not a perſonal Tort only, which dies with the Perſon of the Tort-feſor, as in non Summons, for it being a Wrong by which the Lord is diſinherited and barred of his Fines and other Duties ariſing from the Courts of his Manor, it ſhall by no Means die with the Perſon of the Wrong-doer. (3.) That the Lord need not ſhew any Eſtate in particular, 'tis ſufficient that he was Dominus pro tempore, and if his Eſtate ſhould determine by Alienation, the Tenant ought to plead it Puis darrein Continuance. (4.) The five Years Nonclaim is not material, becauſe a Fine may eſtabliſh the Right of another, but can never eſtabliſh its own Defects. (5.) This Fine is coram non judice, and meerly void: See Br. Fines 47. Br. Deſcent 14. 21 Ed. 3. 20. 7 H. 4. 28. 1 Leon. 290. Herne's Pleader 93.

3 Lev. 417, 419. Where a Writ of Deceipt lies againſt the Cogniſee as well as againſt the Cogniſor of a Fine.

Savery *verſus* Smith.

2 Lutw. The Plaintiff in her Replication pleading Antient Demeſne needs not ſet forth what Title.

IN Replevin for taking his Cattle, &c. The Defendant made Conuſance for Toll in Highworth-Market, demanded of the Plaintiff, which he refuſed to pay, and thereupon he juſtified the Taking the Cattle; the Plaintiff replied, that ſhe is Tenant of the Manor of *Hanningdon* in *Wiltſhire*, which is Antient Demeſne, and that Tenants of Lands in Antient Demeſne are quit of Toll in all Places, &c. and upon a Demurrer to this Replication it was inſiſted for the Defendant, that the Plaintiff had not made a good Title to this Privilege, becauſe ſhe only ſet forth, that ſhe is Tenant of the Manor which is Antient Demeſne, when ſhe ſhould have declared, that ſhe is ſeiſed in Fee of ſuch Lands, &c. which ſhe held of T. F. as of his Manor of Hanningdon, which is Antient Demeſne: But per Curiam, 'tis not neceſſary for ſuch Tenants to ſet forth what Eſtates they have, either in Fee-ſimple or otherwiſe; 'tis ſufficient for them to alledge, that Homines & Tenentes de antiquo Dominico ought to be diſcharged of Toll, &c. then it was objected, that the Plaintiff had laid this Privilege too general, for it was to be diſcharged of Toll generally, and in all Places, &c. when by Law Tenants in Antient Demeſne are not diſcharged of Toll, but only of ſuch Things which ariſe on their own Lands, and which are for the Support and Eaſe of them and their Families; and the Reaſon of this is, becauſe theſe Lands were formerly in the Poſſeſſion of King Edward the Confeſſor, or King William, called the Conqueror; and therefore in the Domeſday-Book, which was made in the 20th Year of the Reign of his Reign, they are called, Terræ Regis Edwardi, and thoſe in the Poſſeſſion of King William are called Terræ Regis; and when any of theſe Lands were alien'd from the Crown, the Tenants were obliged by their Tenure to manure the King's Demeſnes, and therefore to encourage them in that Labour, they had this Privilege to be diſcharged of Toll of all Things which did ariſe or grow on their own Lands; but when they turn Merchants and Traders in other Things, they are not within the Reaſon of this Privilege; ſed per Curiam, to be quit of Toll in Places, ſhall be intended of ſuch Things in all Places where he is Tenant.

1 Leon. 231. Cro. Eliz. 10. Ward *verſ.* Knight.

A P-

APPEAL. *See* Reſtitution.

By the Common Law a Female might have an Appeal as Heir to any Anceſtor as well as the Male; but now, by * Magna Charta, 'tis enacted, that nullus capiatur vel impriſonetur propter appellam fæminæ de morte alterius quam viri ſui. * Cap. 34.

And where a Woman brings an Appeal of the Death of her Husband, ne unques accouple in loyal Matrimony is a good Plea; ſo is a ſecond Marriage, but an Elopement is not.

It lies at any Time within the Year and Day, to be accompted from the Death, and not from the Stroke given; but an Appeal of Robbery may be brought after the Year. Mich. 13 Car. James Gower's Caſe. 2 Inſt. 318. 4 Rep. 42. 4 Leon. 16.

In an Appeal of Felony, a Nonſuit after Appearance is peremptory, and ſo it is in an Appeal of Maihem, becauſe the Writ is felonice maihemavit. 1 Inſt. 139.

In an Appeal of Murder, the Defendant cannot juſtify ſe defendendo, but muſt plead Not guilty, and the Jury ſhall find the Special Matter; but in Caſes not capital, as Mayhem, &c. he may juſtify ſe defendendo, but not in Defence of his Goods; for if he plead Not guilty, he cannot give ſe defendendo in Evidence. 2 Inſt. 316.

In an Appeal, the Defendant having pleaded to Iſſue, may nevertheleſs waive it, and demur upon the Count; for the Trial would be in vain if that fail; and yet if the Demurrer be adjudged againſt the Defendant, the Judgment is only to anſwer over. Cro. Eliz. 196. *Haine's* Caſe.

The Father attainted of Felony, was ſlain by one who had no Authority, the Wife ſhall bring the Appeal and not the Heir, for hæres eſt nomen juris, but Uxor eſt nomen naturæ, and the Attainder of the Husband cannot extinguiſh that natural Relation which is between Man and Wife, tho' it may that civil Relation which is between Anceſtor and Heir. 7 Rep. 13. Sid. 196.

In an Appeal againſt four by Writ, the Defendants appeared at the Return, and the Plaintiff offered to declare againſt them as in Cuſtody: Sed per Curiam, they are not in Cuſtody upon their Appearance, but there muſt be a Committitur or Bail filed, upon which the Plaintiff was called, and Nonſuit. Cro. Eliz. 605. *Holland's* Caſe.

An Infant brought an Appeal per Guardianum, and at the Day it was prayed, that the Guardian might not be demanded for three or four Days being ſick; but per Curiam, it was denied, and ſo the Infant loſt his Appeal. Noy 88. Latch 175.

Prince

Prince *verſus* Bawd. Mich. 5 Will. III.

APpeal of Murder, the Defendant pleaded Auterfoits convict for the ſame Offence, and the Oyer of the Record and Conviction being demanded, it was moved, that it might be entered * in hæc verba: Et per Curiam, Oyer of the Record was granted, but it ſhall not be entered in hæc verba, becauſe it is a Record of the ſame Court; now, upon the Oyer, ſeveral Variances appeared, ſo that it was objected, that the Defendant had failed of his Record, upon which it was prayed to amend, being all in Paper; but on the other Side it was objected, that Auterfoits convict was only pleaded for Delay, for 'tis no Bar within the Statute 3 H. 7. But it was ruled, that before that Statute Auterfoits convict or acquit were good Pleas in Bar of an Appeal, and that the Statute has only the two Pleas of Auterfoits acquit or attaint, but that Auterfoits convict remains as at Common Law.

* Dyer 284.

Hoile *verſus* Pitt.

4 Mod. 158. Amendment not allowed in criminal Caſes.

IN an Appeal of Murder, the Defendant pleaded a Conviction for Manſlaughter at the Seſſions held in the Old Baily, and that he had his Clergy; and before any Demurrer to this Plea, or Iſſue joined, there being a Fault apprehended, becauſe the Defendant did not ſet forth by what Authority the Court at the Old Baily was held; thereupon the Defendant, by his Council, moved to amend his Plea: Sed per Holt Ch. Juſt. the Appellant himſelf cannot amend, and the Reaſon is the ſame why the Appellee ſhould not; for in this Caſe, by an Amendment, a new Roll is made, whereas in other Caſes Amendments are made when all is in Paper; and no Statutes extend to Amendments in Appeals in criminal Cauſes.

Bauſon *verſus* Offley.

3 Mod. 121. Where the Wound was given in one County and the Death was in another County.

IN an Appeal brought by the Wife for the Murder of her Husband; ſhe declared, that on ſuch a Day and Year one Offley did Aſſault and Wound her Husband in the County of H. of which Wound he afterwards, on ſuch a Day, died at R. in the County of C. and that one Lippon was aſſiſting the ſaid Offley, &c. The Cauſe being tried, the Jury found that Lippon gave the Wound, and that Offley was aſſiſting him; and now, upon a Motion in Arreſt of Judgment it was inſiſted for the Appellee,

that the Count and the Verdict in Appeals must be certain, otherwise no Judgment could be given against the Appellee; but here the Verdict found another Person gave the Wound, and not he against whom the Appellant had declared. Sed per Holt, Ch. Just. This is an Exception which might as well be made to an Indictment, as to a Count in an Appeal, for the one ought to be as certain as the other; but in this Case 'tis certain enough, for he who gave the Stroke, and he who was assisting in it, are both equally guilty: Then it was objected, that the Cause was tried in a wrong County; for it was by a Jury in C. when it ought to be by a Jury of both Counties, since the Wound was in one County, and the Death in another. Sed per Curiam, by the Statute * 2 & 3 Ed. 6. 'tis enacted, that an Indictment found by a Jury of that County where the Death happens, shall be as effectual in Law as if the Wound, which was the Cause of such Death, had been given in the same County. *Cap. 24.

Culliford's *Case*.

THE Defendant being indicted for Murder, was found guilty of Manslaughter at the Assises, and an Appeal was immediately brought; the Judge gave the Appellee Time to plead till next Assises, but in the mean Time the Appellant brought an Habeas Corpus & Certiorari, to remove both the Body and the Record into B. R. and afterwards the Parties agreed, and the Appellee being bailed, he appeared in Court upon his Recognisance and produced a Release from the Appellant, and thereupon moved to be discharged, there being a Counsel for the Appellant, and consenting to it. Sed Holt, Ch. Just. The Court will be possessed of the Record before he shall be discharged; therefore let the Habeas Corpus & Certiorari be returned, and the Return filed, then the Appellee must be arraigned, and afterwards he may plead this Release; but if the Appellant is not ready at the Return of the Certiorari to arraign his Appeal, or doth not appear in Person, the Appellee may have a Scire facias to compel him, and if he doth not come in upon the Return of such Scire facias, he shall be demanded and be Nonsuit: But the Appellee is not yet to be discharged, because there is a Record against him in Court, and therefore he must be arraigned upon the Indictment, and then he may plead Auterfoits acquit, &c. Mod. Cases, 219.

A P-

APPERTAINING.

Dyer 362. Co. Ent. 384. Cro. Car. 169. LAnds may be ſaid to be appurtenant to an Houſe, either in the King's Caſe, or in the Caſe of a Common Perſon, when they have been let and poſſeſſed together a convenient Time.

Yelv. 159. A Way cannot be appurtenant or appendant, as a Common may, becauſe 'tis not an Intereſt, but an Eaſement.

1 Inſt. 121. The Thing which and to which 'tis appurtenant muſt agree in Nature and Quality; as Turbary may be appurtenant to an Houſe, but not to Lands, a Leet to a Manor, but not to a Church, a Seat in a Church to an Houſe, but not to Land; ſo an Advowſon ſhall not be appendant to the Services, but to the Demeſnes of a Manor, for the Demeſnes are of a perpetual Duration, but the Services are not.

A Vicaridge may be appendant to a Manor, becauſe 'tis derived out of the Rectory of Common Right; and yet by a Grant it may be annexed to a Manor.

Sid. 24, 211. 1 Lev. 31. W. R. ſells a Mill cum pertinentiis, the Jury find a Kiln was occupied with the Mill for many Years. Sed per Curiam, that Kiln ſhall not paſs by thoſe Words, for it might be a Lime-Kiln, and may have no Relation to the Mill; but if the Jury had found it to be a Malt-Kiln, it migt be otherwiſe.

Rex *verſus Biſhop of* Cheſter.

Antea Tit. Advowſon, S. C. AN Advowſon is appendant to a Manor, the Owner mortgages the Manor in Fee, except the Advowſon, 'tis now become in Groſs, but if the Money is paid on the Day, 'tis become appendant again, and if 'tis paid after the Day, the Advowſon is appendant in Reputation; ſo that it may paſs in a Grant by the Name of an Advowſon appendant, tho' per Holt Ch. Juſt. in Truth the Appendancy is deſtroyed.

Reynalds *verſus* Blake. Paſch. 9 Will. III.

Antea Tit. Advowſon, S. C. TWO Coparceners of a Manor; the Demeſnes are allotted to one, and the Services to the other, the Manor is gone and the Advowſon becomes in Groſs; but if one die without Iſſue, and the Manor deſcend to her who had the Services,

per Holt, Ch. Juſt. the Manor is revived again, and the Advowſon becomes appendant as it was before, for the Severance was by Act in Law.

APPRENTICES. *See* Indictment 17, 21. Travers 8.

Punting's *Caſe*.

AN Order to diſcharge an Apprentice was quaſhed, becauſe it was to the Trade of a Tallow Chandler, which is a Trade not mentioned in the Statute; beſides it was under the Hands and Seals of three Juſtices, when that Statute requires there ſhould be Four. Order to diſcharge an Apprentice quaſhed.

Peck's *Caſe*. Mich. 10 Will. III.

THE Maſter took an Apprentice in Husbandry, and before the Time of Apprenticeſhip expired the Maſter died, and left the Apprentice impotent and a Cripple, the Juſtices made an Order, that the Executors of the Maſter ſhould receive and provide for this Apprentice; but this Order was quaſhed, becauſe it did not appear that they had Aſſets, or that they lived in the ſame County; and by Juſtice Giles Eyre, this is a perſonal Truſt, and determines upon the Death of either the Maſter or Apprentice, and the Executors may be of no Trade, or of another Trade than the Maſter was; but he held, that an Action of Covenant would lie againſt the Executors, but then the Plaintiff muſt prove Aſſets. And per Holt, Ch. Juſt. by the Cuſtom of London in ſuch Caſes, the Executors ſhall put out the Apprentice to another Maſter of the ſame Trade; and in other Places, where a Maſter hath a great Sum with an Apprentice, and covenants for his Inſtruction and Maintenance, it would be hard to conſtrue his Death to be a Diſcharge of 1 Salk. 66. Where the Maſter dies his Executors having Aſſets ſhall provide for the Apprentice.

those Covenants; and that it hath been adjudged, that tho' the Covenant for Inſtruction may fail, yet he ſtill continues an Apprentice with the Executors or Adminiſtrator, to be maintained by them.

Anonymus.

Mod. Caſes, 70. The Maſter brought Covenant againſt the Apprentice for departing at ſuch a Time.

THE Maſter brought an Action of Covenant againſt his Apprentice for departing out of his Service at ſuch a Time. The Defendant juſtified by Vertue of a Licence from his Maſter to depart at that Time; and Iſſue being taken upon the Licence, Holt, Ch. Juſt. held, that upon ſuch a Declaration the Maſter ſhall not give Evidence of the Defendant's departing without Leave at any other Time, becauſe in this Caſe the Time is material and not tranſitory, as in Treſpaſs and other Caſes.

White *verſus* England.

4 Mod. 145. Debt upon the Statute for the uſing the Trade of a Tiler, not ſetting forth, that it was a Trade uſed in *England*, at the Time when the Statute was made.

DEBT upon the Statute 5 Eliz. for uſing the Trade of a Tiler, not being Apprentice to that Trade for ſeven Years. The Defendant pleaded, that his Father was a Freeman of London, and that he (this Defendant) was his eldeſt Son; and that by Vertue of a Cuſtom in London, the eldeſt Son of a Freeman in re patrimonii might uſe his Father's Trade. The Plaintiff demurred to this Plea, and the Counſel for the Defendant did not inſiſt upon it, but objected, that the Declaration was ill, becauſe the Plaintiff did not aver, that the Trade of a Tiler was an Art or Myſtery uſed in England, at that Time when the Statute was made. Sed per Holt, Ch. Juſt. the very Trade is mentioned in this Statute, and therefore it muſt neceſſarily be intended, that it was uſed at that Time.

The Queen verſus Collingwood.

Mod. Caſes, 288. Inticing an Apprentice to take away his Maſter's Goods, not Criminal unleſs ſome Goods were actually taken away.

THE Defendant was indicted, for enticing an Apprentice to take away his Maſter's Goods, which he (the Defendant) did receive, &c. Upon Not guilty pleaded, the Defendant was found guilty; but upon a Motion in Arreſt of Judgment, it was held per Holt, Ch. Juſt. that the Indictment was ill, becauſe it did not ſet forth, that the Apprentice did actually take away any Goods; for an Enticement is not Criminal, without ſomething done in Purſuance of it: 'Tis true, this Indictment ſets forth, that the Defendant did receive the Goods, which implies that they were taken away, for otherwiſe they could not be received; but a Charge

a Charge in an Indictment must be positive, certain and direct, and not by Implication.

APPROPRIATION.

AN Appropriation of an Advowson, Church, Glebe, Tithe, &c. must be to some Body politick or Corporation; and when it was made by the Patron or first Founder, the Form was thus: Ego W. R. de H. concessi Ecclesiam & advocationem meam de H. cum terris & decimis omnibus ad eam pertinentibus Abbati de S. &c. so that not only the Advowson and Profits of the Church, but the Incumbency it self, which is a spiritual Thing, vested in the Appropriator. Plowd. 495.

At Common Law an Appropriation could not be made but to a Body Politick, or to a Corporation, for a natural Person is not capable of it, because he cannot be perpetual, and an Appropriation makes an Incumbent perpetual.

And at Common Law it could not be made to a Lay Person, for as he could not be an Incumbent by a Presentation, so he shall not by an Appropriation, which is but a more lasting Incumbency.

These Appropriations at first were made to Abbots, Deans, and sole Corporations, who might administer Sacramentals, and had Cure of Souls; but afterwards by Dispensations they were made to spiritual Corporations aggregate, who had no Cure of Souls, as to Deans and Chapters, and at last to Nuns under Pretence of Hospitality. Grande nefas, as Dyer calls it. Plow. Com. 497.

An Appropriation cannot be granted over, for 'tis an Incumbency, which is a spiritual Thing, 'tis included in the spiritual Function, which being of the highest Trust, cannot be transferred. Hob. 307.

It cannot be made without the Patron, for his Advowson being a Lay Inheritance, cannot be divested without his Consent, neither can it be made without the Consent or Concurrence of the King, because the Advowson it self is held of him mediately or immediately, and he shall not lose his Possibility of Escheat or Lapse, without his Consent, but an Appropriation may be made by the Patron, and the King acting as supreme Ordinary, without the Bishop; and the Reason is, because, before the Reformation it might have been made by the King, by the Patron and the Pope, and whatever the Pope might have done, is now vested in the King by the Statute of H. 8. Appropriation cannot be made without the Patron.

ARBITRAMENT.

Umpirage.

Where an Umpire is to be chosen by the Arbitrators, the same Time may be limited to the Umpire as was limited to them to make their Award; for by choosing an Umpire they determine their own Power.

2 Vent. 116. Sid. 428. 2 Saund. 127. Mod. 275. Jones 167. 1 Roll. 262. contra.

Where a Submission was to the Award of A. and B. ita quod they make it by such a Time; and if not then, to the Sentence of such Umpire as they shall choose; ita quod he make his Umpirage in the same Time; an Umpirage so made is good, because here was no concurrent Authority, for by choosing an Umpire the Arbitrators had determined their own Power; and therefore, tho' the Arbitrators should make an Award after they had chosen an Umpire, the Umpirage shall be good, but the Award void.

The Law is the same, if the Umpire was appointed by the Parties themselves; for 'tis not an absolute and concurrent Jurisdiction, 'tis only a Power given to the Umpire to act, and that his Umpirage shall stand, if the Arbitrators do not act and make an Award.

Pursuant to the Submission.

Palm. 109, 112, 121. 1 Bulst. 110. 2 Cro. 277, 399. 1 Roll. Rep. 223. Yel. 203. 1 Vent. 50.

Where the Submission is ita quod the Award is made under Hand and Seal, and the Award is only written, but not subscribed, 'tis void; but if the Arbitrator make his Mark, 'tis sufficient.

The Submission was to an Award of W. R. and three more, ita quod it be made by all four, three, or two of them, in such Case an Award made by two or three of them is good, because the joint Authority which was first given to all four, was distributed by the ita quod, &c. and an Authority may be divided, tho' an Interest cannot.

Palm. 108.

A. and B. submitted all Controversies concerning their Title in H. a Sum of Money was awarded to one, and that he should Release all Actions; the Defendant to avoid this Award, avers there were other Actions: Sed non allocatur, for it shall be intended only of such Actions as they had Power over by their Submission; and if he should be sued for not releasing any Action which doth not concern this Title, he may plead the Award as to that was void.

Freeman *verſus* Bernard. Hill. 8 Will. III. B. R.

CASE on an Agreement, the Defendant pleaded a Submiſſion, &c. and an Award made to ſign mutual Releaſes, adjudged an ill Plea; for 'tis not intended, that the Breach of the old Agreement ſhould be diſcharged by this Award, but by the Releaſe; 'tis otherwiſe where the Award it ſelf diſcharges the old Duty and gives a new one.

1 Salk. 69. Plea of an Award to ſign mutual Releaſes, not good.

ARREST.

Brown *verſus* Burlace. 9 Will. III. B. R.

(1.) IN this Caſe it was held, that the Temple is extraparochial, and not within any Pariſh, that 'tis not within the City of London, ſo as to come within the Cuſtoms, but 'tis within the County of the City, but that the White Fryars was within the Juriſdiction of the City.

That both Dugdale and Stow tell us, that the Temple is privileged from Arreſts by the Grant of the King: Sed per Holt Ch. Juſt. If the King hath made ſuch a Grant, 'tis void, becauſe the Templers have no Court of Juſtice within themſelves, yet the Court inclined not to countenance Arreſts in the Temple in Term-time; but would not ſet aſide the Arreſt of the Defendant, who was arreſted in the Temple, and ſo he was held to Special Bail.

The *Temple* is extraparochial, but an Arreſt there was not ſet aſide. *Poſtea* Privilege 12. S. C.

Anonymus. Paſch. 7 Will. III. B. R.

ADjudged, that a common Bailiff is not bound to ſhew his Warrant, either at the Time of the Arreſt, or at any Time after; but he is bound to ſhew the Cauſe of the Arreſt, and at whoſe Suit; but a Special Bailiff may be required to ſhew his War-

Moor 767. 6 Rep. 54. 9 Rep. 69. A common Bailiff is not bound to ſhew his Warrant, but a Special Bailiff is.

Warrant, for he is not known as a common Bailiff is, and no Man is bound to ſubmit himſelf to one who is not known or preſumed to have an Authority.

3 Cro. 180, 408. Moor 711. Sid. 229.

If a Writ is returnable, 9 Feb. or Octab. pur. the Defendant cannot be arreſted by Vertue of ſuch Writ, either on the 10th or 11th of February, tho' 'tis before the Quarto die poſt. if he is arreſted, the Officer cannot juſtify it, either in Treſpaſs or Faiſe Impriſonment brought againſt him; but if the Defendant be taken on a Ca. Sa. on the ninth Day of February, which is the very Day the Writ was returnable, the Arreſt is good.

Paſ. 8 Will. 3.

Where a Capias is awarded againſt W. R. and a Common Bailiff knows the Writ to be in the Hands of the Sheriff: Per Holt Ch. Juſt. he may arreſt W. R. without actually having the Warrant.

9 Rep. 66.

An Arreſt in the Night is good.

Bulſt. 85.

One arreſted in Weſtminſter-Hall, ſedente Curia, may be diſcharged upon Motion, if the Arreſt was on Meſne Proceſs, but not if he was taken in Execution, but even in that Caſe the Officer is puniſhable per Curiam.

In Caſes of Peers and Corporations the Proceſs is a Diſtringas, for they cannot be arreſted.

Aſſault and Battery.

Adjudged, that the Defendant may juſtify an Aſſault in Defence of his Perſon, or of his Wife, becauſe they are but as one Perſon; ſo he may in Defence of his Maſter, becauſe Protection and Allegiance is due to him.

So he may juſtify in Defence of his Father or Mother, Children within Age; and even a * Wounding may be juſtified in Defence of his Perſon, but not of his Poſſeſſions.

* 1 Roll. Rep. 19.

Hill. 8 Will. 3. B. R.

In Aſſault, &c. the Defendant may juſtify the Aſſault to ſave his Perſon, but not to defend his Houſe or Poſſeſſion; for in ſuch Caſe he muſt plead Molliter manus impoſuit; but the Law ſeems to be, that he may juſtify an Aſſault in Defence of his Houſe, tho' in ſuch Caſe he cannot juſtify any Wounding.

2 Roll. 548. Latch 20.

In Treſpaſs for a Battery and Wounding, Son aſſault demeſne is a good Plea, for in this Action the Treſpaſs is the Principal; but in Mayhem 'tis not a good Plea, unleſs it appear, that the Aſſault was ſuch as endangered his Life, for a Man cannot juſtify a Maybem for every Aſſault; as for Inſtance, a Man cannot juſtifie drawing his Sword, and cutting of the Hand of another, becauſe he ſtruck him; but in ſuch Caſe the Defendant ought to plead the Aſſault ſpecially (viz.) That the Plaintiff aſſaulted him and knocked him down, &c. Et ſi malum aliquid evenit, &c. de injuria ſua propria, &c.

Son Aſſault Demeſne, a good Plea for a Battery and Wounding, but not in Maihem.

3 Cro. 268. 2 Roll. 547.

A Maſter may juſtifie the Beating his Apprentice, Servant, Scholar, &c. if the Beating is in Nature of Correction only, and with a proper Inſtrument, otherwiſe immoderate caſtigavit is a good Reply; and ſo it was adjudged in Keits's Caſe per Holt Ch. Juſt.

Aſſault and Battery; the Defendant juſtified, for that the Plaintiff was his Apprentice, and that he tempore quo, &c. gave him gentle Correction, and traverſed that he was guilty at any Time before or after he was his Apprentice; and upon a Demurrer to this Plea it was adjudged ill, becauſe the Defendant ought to ſhew ſome Cauſe ſpecially, or the Fault for which he beat his Apprentice, and then conclude abſque hoc, that he beat him before or after that Time.

The Defendant juſtified, that he gave his Apprentice gentle Correction, but did not ſay for what.

Aſſignment on the Statute 32 *H.* 8. *cap.* 34.

THE Leſſor made a Leaſe for Years, and afterwards aſſigned his Reverſion to W. R. Adjudged, that all Conditions and Covenants between the Leſſor and Leſſee which concern the Thing demiſed, or Rent reſerved; as for Inſtance, Conditions or Covenants for repairing, &c. paying the Rent, &c. are annexed to the Reverſion by this Statute, and paſs with it to the Aſſignee, ſo that he may take the ſame Advantage of them as the Leſſor himſelf might have done before he made any Aſſignment; but not any collateral Covenants, as to pay a Sum

Conditions and Covenants which run with the Land, are annexed to the Reverſion, and go to the Aſſignee.

Sum in Gross, &c. are transferred to the Reversion by this Statute.

Adjudged, that a Bargainee is an Assignee within this Statute; and so, if he grant his Reversion to the Use of W. R. and his Heirs, the cestui que Use, and the Bargainee, are in by this Statute as Assignees, for they are in by the Limitation of the Grantor, and quoad him they are Assignees.

Who is an Assignee within this Statute. 1 Inst. 215.

If a Man makes a Lease for Life to A. and afterwards grants the Reversion to B. either for Life or Years, B. is an Assignee within this Statute; but if he grant the Reversion only of two Acres, or Part of the Land, he is not an Assignee within this Statute to take Advantage of Conditions, because he hath but Part of the Reversion, (i. e.) a Reversion in Part of the Demise, and the Conditions being entire, and against Common Right, cannot be apportioned.

1 Lev. 22.

The Assignee of a Rent without the Reversion, may maintain an Action of Debt for the Rent, if there was an Attorment made, so by that and the Assignment a Privity of Contract passes.

Tho' the Lessee assigns, yet the Lessor may have an Action of Debt for the Rent, and so may his Executor, for there is a Privity of Contract between them.

Sid. 127.

But the Heir of the Lessor cannot maintain an Action of Debt, because the Estate is not in him, but in the Assignee, and there is no Privity of Contract between them.

Debt for Rent was brought against an Assignee; the Defendant pleaded, that he assigned over his Lease; this is ill, unless he shew also, that the Lessor had Notice of the Assignment, and that there was nothing due at the Time of the Assignment; but Covenant will lie against the Lessee, after such an Assignment and Acceptance of Rent.

Attachment Foreign.

Maſters *verſus* Lewis. Trin. 7 Will. III. B. R.

A Creditor of W. R. attaches Money in the Hands of the Ordinary. Adjudged, that it could not be, for a Foreign Attachment cannot charge any other Perſon than the Debtor himſelf, which the Ordinary is not, before Goods of the Inteſtate come to his Hands, for no Creditor of the Inteſtate can ſue him till he hath actual Seiſin, and before ſuch Seiſin he hath ſo little Intereſt in the Matter, that he can neither releaſe or bring the Action; but Goods in the Hands of an Executor or Adminiſtrator may be attached by a Foreign Attachment, becauſe they are Debtors; and yet by this Means a Debt upon Simple Contract may be paid before a Debt upon Specialty.

5 Mod. 25, 92. Foreign Attachment charges only the Debtor.

Ingram *verſus* Bernard. Hill. 13 Will. B. R.

THE Arbitrators made an Award, that W. R. ſhould pay ſo much Money on the ſecond Day of January, he having given a Bond to perform the Award that was attached on the firſt Day of January, and the Money awarded was taken upon that Attachment on the ſecond Day of January. And per Holt, Ch. Juſt. This would have been a good Plea in an Action of Debt brought upon the Award, but not to an Action of Debt brought upon the Bond of Submiſſion, becauſe the Bond is forfeited; and when a Bond is forfeited, 'tis not the Money in the Condition, but the Money in the Bond it ſelf which is attached.

Money awarded was attached.

A Debt due by Judgment obtained in the Courts of Weſtminſter, whether the Action was for Debt or Damages, cannot be attached by the Cuſtom of London.

1 Roll. 552.

A Creditor of W. A. attaches his Debt in the Hands of W. S. who was indebted to the ſaid W. A. and this being removed into B. R. by Certiorari, a Procedendo was granted, becauſe the Party cannot have the like Remedy in B. R. as he may in London.

1 Roll. Rep. 268. Where a Procedendo was granted after an Attachment.

don. Et per Curiam, if A. should sue W. here, and the Defendant should plead the Foreign Attachment, we will allow the Custom, because it comes in by way of Plea; but where it comes by way of Original Suit we cannot do Right to the Parties, therefore a Procedendo was granted.

ATTORNEY.

1 Inst. 128. 8 Rep. 58.

IN all Actions at Common Law, and in all Courts, both the Plaintiff and Defendant appeared in Person; for the Writ commanding them formerly to appear, it was understood an Appearance in Person, and therefore the Entry is still Quærens obtulit se, by which Policy there were many vexatious Suits prevented and avoided; for the Parties were compelled to follow their Suits in proper Person, and could not otherwise prosecute, unless they had the King's special Warrant for that Purpose.

But tho' the Parties could not appear by Attorney, yet after Appearance, and when the Suit was in any of the Superior Courts at Westminster, they had Power to allow them to

F. N. B. 25. c. proceed by Attorney; but in other Courts that Privilege was not allowed, but the Party must sue out a Dedimus potestatem de Attornato faciend'.

Action for his Fees.

One who is Attorney of Record, may bring an Action of Debt or an Action on the Case for his Fees; but he, who is not an Attorney of Record, can only have an Action on the Case.

Allen 4.

Assumpsit by an Attorney, in which he declared, that the Defendant promised to pay his Fees; the Defendant pleaded the

3 Jac. cap. 7. Statute 3 Jac. and that the Plaintiff had not given him a Bill under his Hand; and upon a Demurrer to this Plea the Plaintiff had Judgment, because the Statute doth not extend to a special Action upon the Promise.

Anonimus. Trin. 2 Annæ.

Where an Attorney appears without a Warrant and Judgment is had against his Client, it shall not be set aside, if the Attorney is responsible.

IF an Attorney appear, and Judgment is against his Client, and he had no Warrant of Attorney from him to appear, the Question was, if the Court would set aside the Judgment. Et per Curiam, If the Attorney is responsible, it shall not be

set aside, because the Judgment was regular; and there is no Reason that the Plaintiff should suffer when he is not in Fault: But if the Attorney is not responsible, or suspected to be unable, the Judgment shall be set aside, for otherwise the Defendant has no Remedy.

ATTORNMENT.

Quarn *versus* Rowe. Hill. 5 Will. III. B. R.

This Case is reported in 1 Salk. by the Name of Gwam & al' versus Roe, but not in the following Manner, which was thus: 1 Salk. 90.

If. Tenant in Tail made a Lease to W. R. to commence five Years after, but in the mean Time he levied a Fine to L. R. to the Use of the Conusee and his Heirs; afterwards the Lessee entered by Vertue of this, and the Conusee brought an Action of Debt against him for Rent arrear reserved on the said Lease; and upon a Demurrer to the Declartion it was objected, that it was ill, because the Plaintiff did not set forth any Attornment, and he being in by the Common Law, and not by the Statute of Uses, an Attornment is necessary to create a Privity and to support this Action: But this Objection was not allowed, because the Lessee having only an Interesse Termini at the Time of the Fine levied, could not attorn; and the Reversion upon his Term passed at that Time as included in the Possession. Where an Attornment is necessary to create a Privity.

W. R. made a Lease to B. for fifty Years, and afterwards granted his Reversion to R. then B. assigned the Term to R. before any Attornment, and before he had Notice of the Grant of the Reversion: Adjudged, that the whole Estate is vested in R. immediately, and that the Term is extinguished; for in this Case there is no Body to attorn, and therefore the Law vests all in R. without any Attornment.

1 Vent. 248. The Lessor granted the Reversion to another, and afterwards brought an Action of Debt for the Rent; the Lessee pleaded, that he had granted away the Reversion, but did not set forth that he attorned; adjudged, that this Plea of it self amounted to an Attornment.

2 Cro. 87. Adjudged, that an Attornment to Part is good for the Whole, for it shall be taken most strongly against him; and he having only a Power to assent, he cannot divide or apportion the Thing granted.

AVERMENT. *See* Superstitious Use 3.

Matthews *versus* Carey. Mich. 1 Will. III. B. R.

1 Salk. 108. 3 Mod. 137. In Trespass the Defendant justified under a Presentment in a Leet, and good.

(1.) IN Trespass for taking a Distress, the Defendant justified, under a Presentment in the Leet, for an Offence, &c. and did not aver in his Plea, that the Offence was committed; and upon a Demurrer it was adjudged, that he need not make such an Averment, because as to him 'tis not material, whether the Offence was actually committed, or not, 'tis sufficient that the Jury had presented it; and as to this Matter, the Court distinguished between a Replevin and a Trepass, for in the first Case the Bailiff is an Actor and must recover upon the Merits of the Cause, but in Trespass he is only to excuse the Wrong alledged against him, but the Plea was adjudged ill upon another Point, which see in 1 Salk. 108.

Negative Pleas need not be averred.

(2.) Adjudged, that negative Pleas ought not to be averred, because a Negative cannot be proved; but affirmative Pleas must be averred, with hoc paratus est verificare.

(3) In Debt upon a Bond for Performance of Covenants; the Defendant pleaded Performance; the Plaintiff replied, that he was bound to give him (the Plaintiff) an Accompt of all Money received, &c. and shews, that 10 l. came to his (the Defendant's) hands, and that he had not accounted for it; the Defendant, in his Rejoinder, confessed the Receipt of the Money, but pleads, that he laid it up in his Master's House, and that it was stolen, Et hoc paratus est verificare; adjudged, that this Averment was proper, and that he ought not to have concluded to the Country, because, having alledged new Matter, he ought to give the Plaintiff Liberty to come in and answer it.

Where *hoc paratus est verificare* is good.

But now the Want of paratus est verificare, or prout patet per Recordum is aided by the Statute 16 Car. 2.

Mason *versus* March. Trin. 11 Will. III.

(4.) IN false Imprisonment, laid to be in the Vacation, the Defendant pleaded a Writ issued Teste in Term-time, per quod he took the Plaintiff; he may reply, that tho' it was Teste in Term, yet he took him in Vacation; for per Holt Ch. Just. where the Teste of a Writ is in Support of Justice no Averment shall be admitted against it, otherwise where 'tis to justify a Wrong done.

Where a Teste of a Writ is in Support of Justice, an Averment shall not be against it.

AVOWRY.

(1.) NOT only he who brings the Replevin, but the Avowant also is an Actor; for the one sues for Damages in Taking the Cattle, and the other sues for a Return habend', or a Restitution of the Goods taken; and therefore the Avowant (i.e.) The Defendant must conclude his Avowry as Declarations are concluded, and not with an hoc paratus est verificare, for he is an Actor, and his Avowry is his Declaration, and the Return of the Goods is his Recovery.

Plowd. 392.

(2.) In an Avowry for Damage-feasant, the Defendant entituled himself under a Lease of the Husband, and for not shewing it was by Deed, for that it could not be the Lease of the Wife, but of the Husband only; and this being made an Objection, it was dis-

Sav. 111.

diſallowed, becauſe the Plea was by Way of Bar, and a Bar is good to a common Intent.

(3.) In Replevin, the Defendant made Conuſance, for that the Goods taken were the Goods of W. R. and not the Goods of the Plaintiff; and upon a Demurrer to this Avowry, the Avowant had Judgment, for tho' he did not pray a Return in his Avowry, yet he ſhall have Judgment for a Return, becauſe it appears by the Declaration, that the Defendant took the Goods, and ſo had the Poſſeſſion of them, till by the Replevin they were delivered to the Plaintiff, and therefore they ſhall be returned to the Defendant, that he may be in ſtatu quo prius, &c.

(4.) In Replevin, the Defendant avowed for Damage-feaſant, and had a Verdict; adjudged, that he ſhall have a Retorn habend' for the Cattle, and a Ca. Sa. for the Damages; but if the Party tender the Coſts and Damages, the Sheriff after ſuch Tender ought not to execute the Retorn habend'.

3 Cro. 162. But if for Want of ſuch Tender the Sheriff doth execute the Retorn habend', and afterwards the Coſts and Damages are paid, a Writ ſi conſtare poterit, &c. lies upon ſuggeſting, that the Coſts, &c. are paid, and this is to deliver the Diſtreſs, and this is called a Writ of Reſtitution.

Parker *verſus* Meller. Paſch. 2 Annæ.

(5.) In Replevin, if the Defendant had the Poſſeſſion, 'tis a good Bar againſt the Plaintiff if he has no Title, but he cannot give a Return, unleſs he ſhew a Property in the Goods; and 'tis ſufficient if they were delivered to him, for otherwiſe the Judgment muſt be quod quærens nil capiat per Billam, but no Return.

AUTHORITY. *See* Deputy.
A Leaſe at Will 3.

BAIL.

BAIL.

Wyatt *verſus* Evans. Hill. 5 Will. III. B. R.

(1.) DEBT for 99 s. upon a Plaint levied in an Inferior Court and Bail put in; afterwards the Cauſe was removed by Habeas Corpus into B. R. and there the Plaintiff declared as in Debt upon a Bond for 6 l. The Queſtion was, whether the Bail put in here, upon the Habeas Corpus, ſhould be liable? and adjudged, that they ſhould not, for it was another Cauſe of Action than that to which they were Bail.

Where Bail, put in upon the Removal of a Cauſe by *Habeas Corpus*, is not liable.

Anonymus. Paſch. 4 Annæ B. R.

(2.) DEBT was brought in C. B. and a Recognizance taken, and an Action of Debt was brought on that Recogniſance in B. R. The Court was moved, that there might be no Special Bail given, for that this was only a Device to better the Security. Sed per Holt, Ch. Juſt. and Powell, Upon a Recogniſance of Bail in C. B. no Capias lies, becauſe 'tis for a Sum certain; but upon the like Recogniſance in B. R. a Capias lies, becauſe 'tis Body for Body, and there may be a Reaſon to help them to a Capias upon the Recogniſance; and per Holt, in Debt upon a Judgment pending a Writ of Error, the Court will diſcharge the Defendant upon Common Bail; but per Powell Juſt. 'twas antiently otherwiſe.

Debt in B.R. on a Recognizance of Bail in C. B.

Butler *verſus* Rolls.

Mod. Caſes 25.

(3.) THE Defendant was ſued on a Bail-Bond; to which Action he pleaded and had Notice of Trial, and then he moved to ſtay Proceedings on the Bond, upon bringing the Principal, Intereſt and Coſts into Court, which was granted, ſo as he bring it in ſuch Time, that the Plaintiff might not be delayed of the Trial, otherwiſe to proceed.

Where Proceedings were ſtaid upon the Bail bringing in the Principal Money, and Intereſt, and Coſts into Court.

(4.) It

Mod. Caſes, 229. Proceedings on the Bail-Bond muſt ſtay, if there is not Return of a *Cepi Corpus.*

(4.) It was ruled per Holt, Ch. Juſt. That the antient Courſe was, that a Bail-Bond could not be put to Suit till a Rule was had to amerce the Sheriff, for not having the Body at the Return of the Writ; and the Courſe now is to ſtay Proceedings on the Bail-Bond, if there is no Return of a Cepi Corpus.

Craggett *verſus Glover.*

Mod. Caſes 301. Where a Priſoner diſcharged and retaken muſt find Special Bail.

(5.) After a Priſoner for Debt under a 100l. was diſcharged by the Juſtices purſuant to the Act of Poor Priſoners, he was taken again for above 100 l. at the Suit of one Man, and it was ruled, that he muſt find Special Bail.

Gibbons *verſus* Dove.

Mod. Caſes 230. Bail on a Writ of Error, the other Side hath twenty Days Time to except againſt them.

(6.) BAIL was put in upon bringing a Writ of Error; the Courſe is, that the other Side ſhall have twenty Days to except againſt them, which Exception muſt be entred in the Book of the Clerk of the Errors, and then he who excepts, muſt take out a Rule to put in better Bail, and ſerve the Attorney on the other Side with it; but ſuch Rule needs not be ſerved within twenty Days.

Barney's *Caſe.*

5 Mod. 323. A Woman bailed that was indicted for Petit Treaſon.

(7.) A Feme Covert was indicted for Petty Treaſon, in murdering her Husband; and the Grand Jury having found the Bill, ſhe was brought to the Bar, and moved by her Counſel, to be bailed; and there being ſome Affidavits read of the Fact, by which it appeared to the Court, that the Proſecution was malitious, and there having been no Proceedings for ſome Time, either upon the Indictment or the Coroner's Inqueſt, the Court thougt fit to Bail her.

2 Cro. 738. 2 Bulſt. 182. Moor 850. *Ca. Sa.* againſt the Principal, and *Non eſt inventus* returned, yet the Court will receive a Render in Favour of the Bail.

(8.) Adjudged, That tho' Non eſt inventus is returned upon a Ca. Sa. againſt the Principal, yet the Court will receive a Render; ſo they will upon the Return of the firſt Sci. fa. againſt the Bail, and ſo they will upon the Return of the ſecond Sci. fa. ſo as it be done on the Day of the Return, either ſitting the Court, or afterwards at a Judges Chamber; but tho' the Court doth receive ſuch Renders in Favour of the Bail, yet 'tis de merâ gratia, and not de jure, and therefore the Bail cannot plead ſuch Render to a Sci. fa. brought againſt them.

(9.) But in a Scire facias againſt the Bail, they may plead the Death of the Principal before the Return of the Capias; for they had Time till then to render him, but not afterwards, for by the Return of Non eſt inventus, the Recogniſance is forfeited.

Where the Bail may plead the Death of the Principal.

King *verſus* Sharp. Hill. 7 Will. III. B. R.

(10.) SCire facias againſt the Bail, who plead, that the Principal died before the Return of the Capias, &c. and upon a ſpecial Demurrer, this Plea was adjudged ill; for it ſhould be, that he died before the Return of any Capias, that it may appear he was not alive at the Return of the firſt Capias, for if he was, the Recogniſance is forfeited.

5 Mod. 167 Bail pleaded, that the Principal died before the Return of the *Capias* againſt the Principal, not good. Jones 29.

(11.) Now the Reaſon why the Death of the Principal before any Capias ſued out, is a good Plea, is, becauſe the Principal had Election either to pay the Money, or to render his Body to Priſon, and the laſt is become impoſſible by the Act of God.

(12.) But the Bail in a Writ of Error cannot render the Principal in Diſcharge of themſelves, becauſe they are bound, that he ſhall proſecute his Writ of Error with Effect, or pay the Money, if Judgment be affirmed.

Groſvenor *verſus* Soame. Hill. 2 Will. III.

(13.) IF the Sheriff take inſufficient Bail, no Action lies againſt him; but if he hath not the Defendant forth coming to appear and anſwer the Plaintiff, he may be amerced, but not after the Plaintiff hath accepted an Aſſignment of the Bail-Bond.

Mod. Caſes, 122. No Action lies againſt the Sheriff for taking inſufficient Bail.

Page *verſus* Price.

(14.) WHere an Executor is ſued in the Detinet, as he muſt upon the Contracts of his Teſtator, he ſhall not put in Special Bail; but he muſt, if he is ſued on his own Bond or Contract.

Where an Executor ſhall put in Special Bail, where not.

(15.) Nota, All Crimes were bailable at Common Law, for Carcer eſt mala manſio, that Place being Surety for none but ſuch who could find no other, and they were bailable by the

Sheriff or Bailiffs of Franchiſes, and ſometimes by Writs; as that De odio & atia, Homine Replegiando or the Writ De Manucaptione, and ſometimes Ex officio, and in all Caſes by B. R. upon an Habeas Corpus; but Homicide was by Statute excepted out of the Power of the Sheriff, ſo that he could not Bail in that Caſe, without the Writ De odio & atia, and that was founded upon an Inquiſition, by which it was found, that the Party was indicted out of Malice.

(16.) But in Caſes of Murder, Manſlaughter, Felony, &c. the Party is not bailable per Statute Weſtm. 1. cap. 15. eſpecially where there is any Preſumption of Guilt (i. e.) he is not Bailable by the Juſtices of Peace, for they are within this Statute; but they are bailable in B. R. at Diſcretion, for the Statute doth not extend to that Court.

Anonymus. Trin. 11 Will. III. B. R.

Murder not bailable.

(17.) A Perſon was committed for Murder, and he moved to be bailed. Two Judges were of Opinion that he might, becauſe the Evidence did not prove him guilty; but Holt, Ch. Juſt. and Gould, Juſt. were againſt it, for that the Evidence did affect him, and to allow him this Favour would diſcourage Proſecutions; and they would not give any Opinion of the Evidence, for as it might prejudice the Priſoner on the one Side, ſo it might the Proſecutor one the other Side.

Anonymus. Paſch. 7 Will. III.

One in Execution for Uſury, not bailable.

(18.) PER Holt, Ch. Juſt. one in Execution upon a Judgment for Uſury, brought a Writ of Error in B. R. and moved to be bailed, but it was denied, tho' there was an apparent Error in the Record, and tho' it was formerly the Practice to bail in ſuch Caſe; for per Curiam, we ought not to Enlarge a Priſoner in Execution; but 'tis otherwiſe upon an Audita Querela.

BANK-

BANKRUPT.

Feltham *versus* Cudworth. Pasch. 12 Will. III. B. R. Rot. 97.

(1.) SCire facias on a Judgment, the Defendant pleaded a Composition for 2s. in the Pound: Ita quod it be paid within five Years after the major Part of his Creditors in Number and Value shall subscribe the said Composition; and after the Defendant should be discharged from Imprisonment; and upon a Demurrer to this Plea, Holt Ch. Just. was of Opinion, that a Composition by Vertue of the Statute must be final, and such as will bind the Defendant, and from which he cannot vary, that those Words ita quod, in Things executory (as in this Case) make a Condition precedent; but in Estates executed, they make a Condition subsequent, and so is Littleton to be understood, that the Payment of 2s. per Pound, being a Condition precedent to this Agreement, and wholly in the Power and Will of the Defendant till 'tis paid; 'tis therefore no compleat Agreement, and consequently not within the Statute; and this Case is the stronger against the Defendant, because it doth not appear by his Plea, that he was in Prison, so that this Condition precedent may be impossible to be performed, and consequently the Agreement can never arise; 'tis true, it might have been otherwise if the 2s. in the Pound had been agreed to be paid within the five Years, in the Nature of a Defeasance to the Agreement, for this Statute operates as a Defeasance.

Farr. 10. Composition made by Virtue of the Statute against Bankrupts, must be final.

Hussey *versus* Fidell. Hill. 11 Will. III. B. R.

(2.) ADjudged, that a Sale of Goods by a Bankrupt, after an Act of Bankruptcy, is not meerly void; the Contract is good between the Parties, but it may be avoided or not avoided by the Commissioners and Assignees at Pleasure; therefore they may either bring Trover for the Goods, as supposing

Sale of Goods by a Bankrupt after an Act of Bankruptcy, void.

Sheriff or Bailiffs of Franchiſes, and ſometimes by Writs; as that De odio & atia, Homine Replegiando or the Writ De Manucaptione, and ſometimes Ex officio, and in all Caſes by B. R. upon an Habeas Corpus; but Homicide was by Statute excepted out of the Power of the Sheriff, ſo that he could not Bail in that Caſe, without the Writ De odio & atia, and that was founded upon an Inquiſition, by which it was found, that the Party was indicted out of Malice.

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Anonymus. Paſch. 7 Will. III.

One in Execution for Uſury, not bailable.

(18.) PER Holt, Ch. Juſt. one in Execution upon a Judgment for Uſury, brought a Writ of Error in B. R. and moved to be bailed, but it was denied, tho' there was an apparent Error in the Record, and tho' it was formerly the Practice to bail in ſuch Caſe; for per Curiam, we ought not to Enlarge a Priſoner in Execution; but 'tis otherwiſe upon an Audita Querela.

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Farr. 10. Compoſition made by Virtue of the Statute againſt Bankrupts, muſt be final.

Huſſey *verſus* Fidell. Hill. 11 Will. III. B. R.

(2.) ADjudged, that a Sale of Goods by a Bankrupt, after an Act of Bankruptcy, is not meerly void; the Contract is good between the Parties, but it may be avoided or not avoided by the Commiſſioners and Aſſignees at Pleaſure; therefore they may either bring Trover for the Goods, as ſuppoſing

Sale of Goods by a Bankrupt after an Act of Bankruptcy, void.

the Contract to be void, or may bring Debt or Assumpsit for the Value, which affirms the Contract.

Ellis *versus* Ollave. Trin. 11 Will. III. B. R.

Composition made with the Parties signing, binds the rest.

(3.) IN a Case between the said Parties, an Objection was made to the Composition, for that the Agreement appeared to be only to, for, and with these Creditors who were Parties, and had signed the Composition; but this Objection was disallowed, because the Statute makes this an Agreement for the rest.

Dyson *versus* Glover. Trin. 11 Will. III.

The Act recited as Nonsense.

(4.) THE Defendant setting forth and reciting the Statute in his Plea, alledged it thus, (viz.) Quod liceret vad' & pro duobus, &c. realium creditorum facere agreamentum, &c. cum aliquibus creditorum suorum; & per Curiam, this being a private Act and set forth as Nonsence; and the Defendant having not brought himself within it, 'tis ill; for he hath compounded as a Debtor, and not as a Creditor: So the Plaintiff had Judgment.

Cro. Car. 568. Jones 451. Copyhold Estate bound by the Sale of the Commissioners.

(5.) The Custom of a Manor was, that where a Copyholder died seised in Fee, his Wife should have the third Part of his Lands for her Dower for Life, and thirteen Years after, which Custom was confirmed by Act of Parliament, afterwards the Husband Copyholder became a Bankrupt, and the Commissioners sold his Estate to his Creditors; then the Husband died, and after his Death the Vendees were admitted, and the Wife claimed Dower, alledging, that her Husband died seised; and the rather, because the Vendees were not admitted till after his Death: Sed per Curiam, the Estate of the Husband was bound by the Sale of the Commissioners, and the Bargainee was vested of the Estate, tho' he could not enter to take the Profits, till Admittance and Composition with the Lord for a Fine; but if it should be otherwise, yet when once the Bargainee was admitted by the Lord, such Admittance shall have Relation, and divest the whole Estate ab initio.

2 Cro. 25. Sale of Goods by a Bankrupt, but before any Commission taken out, void.

(6.) A Man became a Bankrupt 12 Feb. and afterwards, but before any Commission taken out, he made over his Goods to W. R. who was one of his Creditors, in Satisfaction of his Debt; afterwards the Commissioners sold these Goods to other Creditors, who brought an Action of Trover against W. R. & per

Curiam, the Sale made to him by the Bankrupt is void by the Statute, for it would be absurd, that he should be credited to dispose and distribute his Goods, who is discredited by his Bankruptcy.

Anonymus. Pasch. 7 Will. III.

(7.) TWo joint Traders, one of them became a Bankrupt: Per Holt Ch. Just. the Commissioners cannot meddle with the Interest of the other, for 'tis not affected by the Bankruptcy of his Companion.

The Interest of a joint Trader is not bound by the Bankruptcy of his Companion.

BARGAIN and SALE.

(1.) EMptio & Venditio is an Agreement for the Seller to part with a Thing for Money given to him by the Buyer, for if it be of one Thing for another in Specie, 'tis not a Bargain and Sale, but an Exchange, which was the original Way of Buying before Money was invented.

(2.) In emptione & venditione, we are to consider not only what is the express Agreement of the Parties, but likewise what is implied jure naturali & positivo.

(3.) And first 'tis implied, that the Seller shall deliver the Thing sold, and that he shall keep it safe till 'tis delivered, which he is bound to do with the same Care as if it was a Thing lent to him, for the Seller had, or is presumed to have, a Benefit by the Sale; but this Care of keeping is only for a reasonable Time, for after a faulty Neglect of the Buyer, if the Thing is lost, the Seller is not liable, unless it was lost dolo malo.

(4.) Where no Place, or Time of Delivery, or Payment is appointed, 'tis always implied, that the Delivery be made immediately, and Payment upon the Delivery, unless 'tis inconsistent with the Nature of the Thing to be delivered.

(5.) Now by a bare Agreement the Bargain may be so far perfected, without any Delivery or Payment of Money, that the Par-

Parties may have an Action on the Case for Non-performance of the Agreement, but no Property vests till there is a Delivery; and therefore if a second Buyer gets a Delivery, he has the better Title.

Bargain and Sale, without any Consideration, not good without an Attornment.

(6.) As to Bargain and Sale upon the Statute, it has been held, that if a Man plead a Bargain and Sale of a Rent, and set forth no Consideration, in such Case he must shew an Attornment, for then it enures as a Grant at Common Law, which cannot be without an Attornment; but if a Consideration is expressed, 'tis otherwise, because then 'tis a Conveyance by the Statute, to which an Attornment is not necessary, but then he must plead it to be enrolled, and in what Court, that the Defendant may be able to find it.

3 Cro. 166. Yel. 213.

(7.) And as to that Matter, to plead a Bargain and Sale of a Reversion by Deed Debito modo irrotulat' in Cancellaria, is not good after a Verdict; for non constat, whether it be an Enrollment at Common Law, or by the Statute.

(8.) But if 'tis said per Indenturam secundum formam Statuti debito modo irrotulat' in Cancellaria, 'tis good, for debito modo implies all, (viz.) a Consideration, and within six Months.

BARON and FEME.
See Executor 2.

Maddox *versus* Winne. Pasch. 12 Will. III. B. R.

Where they are but as one Person in Law.

(1.) HUsband and Wife were sued, and afterwards in the Pleadings it was said Venerunt partes prædict' per Attornatos suos prædict', this was held naught upon a Writ of Error, because they are but one Person in Law.

Woodier *versus* Gresham. Mich: 9 Will. III.

(2.) SCire facias was brought by Husband and Wife, upon a Judgment obtained by the Wife dum sola, upon which Scire facias there was an Award of Execution, and then the Wife died, and the Husband brought a new Sci. fa. &c. and afterwards, upon a Writ of Error brought, the Question was, Whether what was recovered upon this Judgment should go to the Husband, or to the Administrator of the Wife? It was insisted for the Administrator, that the Award of Execution upon the first Scire facias, did not vest any Right in the Husband, because the Execution must still be on the Judgment obtained by the Wife. But per Holt, Ch. Just. this Case doth not differ from the Case of * Obrian and Ram, which was Judgment against a Feme Sole, who afterwards married, and upon a Scire facias brought against Husband and Wife, Execution was awarded against both; then the Wife died, and a Sci. fa. was brought against the Husband alone, and he was adjudged to be chargeable, which proves, that the Award of Execution upon the first Scire facias, made a plain Alteration of the Case, for if that had not been done, the Husband would not have been liable upon the Judgment had against his Wife; so here, in the Principal Case, by the Award of Execution upon the first Scire facias, a Right is attached in the Husband, which shall survive to him after the Death of his Wife, and that he might charge another in the same Manner as he might be charged himself.

1 Salk. 116. *Scire facias* by Husband and Wife on a Judgment she had *dum sola*, and an Award of Execution, and then the Wife died, a Right is attached in the Husband.

* Mich. 3 Jac. 2. B. R. Rot. 192. 3 Mod. 186.

Buckly & Ux' *versus* Collier. Mich 4 Will. III. B. R.

(3.) HUsband and Wife brought an Action on the Case, in which they declared, that the Defendant being indebted to them for Periwig Work done by the Wife, at the Instance and Request of the Defendant; he promised to pay, &c. and upon a Demurrer to this Declaration, it was adjudged ill, because the Duty belongs to the Husband, and shall survive to his Executors if he die; therefore she ought not to be joined in this Action with the Husband, unless an * express Promise had been made to her to pay the Money.

Where the Wife ought not to be joined in the Action, unless an express Promise was made to her.

* 2 Cro. 77, 205.

Machell & Ux' *verſus* Garrett. Mich. 11 Will. III. B. R.

Where *Nunquam in legitimo modo copulati*, is no good Plea.

(4.) CASE, &c. by Husband and Wife, for a Cauſe ariſing to the Wife before Marriage, &c. The Defendant pleaded, that the Plaintiffs Nunquam fuerunt legitimo matrimonio copulati. The Plaintiffs replied, that they were married at ſuch a Time and Place, and upon a Demurrer to this Replication, the Plaintiffs had Judgment; for per Curiam, in perſonal Actions (as this was) it was Right to lay the Matter upon the Fact of the Marriage, to make it iſſuable and triable by a Jury, and not upon the Right of the Marriage, as the Defendant had done in his Plea, and as it ought to be done in Appeals and real Actions.

Hutton *verſus* Manſell. Paſch. 3 Annæ.

3 Lev. 65.

(5.) CASE by Feme Sole, in which ſhe declared, quod cum ſhe agreed and promiſed to marry the Defendant, he in Conſideratione inde, promiſed to marry her, and at the Trial the Promiſe of the Man was proved. Et per Holt, Ch. Juſt. there is no Neceſſity of proving an actual Promiſe on the Woman's Part; for 'tis ſufficient Evidence to ſhew, that ſhe countenanced the Promiſe, and carried her ſelf ſo as one, who approved and conſented to it.

Hob. 3. Roll. 344. Where Huſband and Wife Mortgage her Lands, and ſhe die, the Husband ſhall redeem.

(6.) Adjudged, That where Baron and Feme mortgage the Lands of the Wife, and ſhe dies, the Equity of Redemption ſhall ſurvive to the Husband, and not to the Adminiſtrator of the Wife; but if he die, the Wife ſhall have the Benefit of Redemption, and not the Executor of the Husband.

Powell *verſus* Maine.

3 Lev. 403. Where he alone may bring the Action.

(7.) T. M. entred into a Bond to a Feme Sole, conditioned to pay ſo much Money on a Day certain, and afterwards ſhe married the Plaintiff, who brought an Action of Debt on this Bond. The Defendant demanded Oyer of the Bond and Condition, which was to pay ſo much Money to the Wife, and then he demurred to the Declaration. Sed per Curiam, Judgment was given for the Plaintiff.

Withers *verſus* Kelſey.

(8.) A Woman had a Portion deviſed to her, and the Payment thereof was charged on certain Lands, afterwards upon her Marriage with T. S. he ſettled a Jointure on her, and died, before he received the Portion, having made a Will and appointed an Executor. Adjudged, That the Executor ſhall have this Money, becauſe 'tis not in Nature of a Choſe in Action, but in Nature of a Rent, for 'tis charged on Lands, and 'tis given the Husband by the Intermarriage; and for that Reaſon it ſhall go to his Executor, and not to his Wife ſurviving him.

1 Ch. Rep. 189. Lands were charged to pay a Woman's Portion, ſhe married and the Husband died before he received it, the Executor of the Husband ſhall have it.

Thompſon *verſus* Woods.

(9.) DEBT upon Bond conditioned to leave his Wife 80 l. at his Death in Caſe ſhe ſhould ſurvive, ſo that ſhe might receive and take it to her own Uſe; the Husband died, and in an Action of Debt brought againſt his Adminiſtrator, he pleaded, that the Husband made a Will, and his Wife Executrix, and left Goods to the Value of 100 l. and upwards, and deviſed, that ſhe pay her ſelf the ſaid 80 l. and upon a Demurrer to this Plea, it was adjudged ill; becauſe the Husband at his Death might owe Money on Judgments and Statutes, and ſo ſhe might not be able to pay her ſelf, and his Eſtate might be ſo incumbred, that it would be better for her to renounce the Executorſhip.

3 Lev. 218. Plea to a Debt on a Bond to leave his Wife ſo much, not good.

Rands *verſus* Tripp.

(10.) THE Plaintiff being a Tradeſman in London, and having married the Defendant's Daughter, with whom he had 400 l. Portion; the Defendant ſpoke merrily in Company, that as ſoon as his Son in Law ſhould be Knighted, ſo that his Daughter might be a Lady, he would give her 2000 l. Afterwards the Plaintiff, without acquainting the Defendant with it, procured himſelf to be Knighted, and then brought an Action upon this Promiſe, and the Jury gave 1500 l. Damages, which the Chief Juſtice thought a very hard Verdict, becauſe the Words were ſpoken merrily, intending only to pay the Money, when the Plaintiff by his Trade (which was a Tobacconiſt) ſhould get an Eſtate to qualifie him for Knighthood, and therefore a new Trial was granted.

Promiſe to pay the Huſband ſo much when his Wife ſhould be a Lady, good.

BASTARD.

Maſters *verſus* Child. Hill. 10 Will. III. B. R.

Baſtard is ſettled in the Place where born, unleſs by Fraud ſhe was delivered there.

(1.) RUled, that the Birth of a Baſtard Child prima facie ſettles it in the Place where it was born; but if a Woman big with Child of a Baſtard, and ſettled in one Pariſh, is perſwaded to go into another, and there to be delivered, this Fraud will make the Pariſh chargeable where the Mother was ſettled, tho' the Child was not born there: But if a Woman with Child of a Baſtard come accidentally into one Pariſh, and is perſwaded by ſome of the Pariſhioners to go into another Pariſh, which ſhe doth, and there is delivered, this ſhall not charge that Pariſh which perſwaded her.

The Queen verſus Chaſin. Paſch. 1 Annæ B. R.

Order, that the reputed Father ſhould give Security to perform the Order, quaſhed.

(2.) AN Order of Seſſions was made upon an Appeal, for maintaining a Baſtard-Child, which Order was quaſhed; and thereupon it was moved, that the reputed Father might be bound in B. R. to appear below; and per Curiam, if the Original Order made by the Juſtices is below, we will oblige him to go down again, but if it is here, we cannot; and it appearing, that the Original Order was in B. R. and by Conſequence, that the Juſtices could have no Authority below, the Court was moved, that the reputed Father might give Security to perform; but that was oppoſed, becauſe the Courſe is to pray, that the Order might be confirmed, and then there is Occaſion for giving Security, becauſe, if the Order thus confirmed is not obeyed, the other Side may have the Proceſs of this Court againſt the reputed Father, or he may be bound to appear at the Seſſions; afterwards this Order was quaſhed as to Part, and confirmed as to the Reſidue; the Part for which it was quaſhed was, that the reputed Father ſhould give Security to perform the Order, which, per Curiam, is naught.

(3.) A Baſtard is Terminus a quo, he is the firſt of his Family, for he hath no Relation of which the Law takes any Notice, but this muſt be underſtood as to civil Purpoſes, for there is a

Relation as to moral Purposes, therefore he cannot marry his own Mother or Baſtard Siſter.

BILL of EXCEPTIONS.

See Evidence 10.

BILLS of EXCHANGE.

See Executor 10. Infant 12.

Nicholſon *verſus* Seldnith. Paſch. 9 Will. III. C. B.

(1.) RUled, that where a Bill is drawn payable to W. R. or Bearer, an Aſſignee muſt ſue in the Name of him to whom it was made payable, and not in his own Name; for if the Bearer was allowed to ſue in his own Name, then a Stranger, who by Accident may find the Note, if loſt, might recover: But if 'tis made payable to W. R. or Order, there an Aſſignee may ſue in his own Name, becauſe the Order muſt be made by Indorſement, or the like, to ſhew the Drawer's Conſent.

Difference between a Bill payable to *W. R.* or *Bearer*, and to him or *Order*.

Jordan *verſus* Barloe. Paſch. 12 Will. III. B. R.

(2.) RUled, that where a Bill is drawn payable to W. R. or Order, 'tis within the Cuſtom of Merchants, and ſuch a Bill may be negotiated and aſſigned by Cuſtom, and the Contract of the Parties, and an Action may be grounded on it, tho' 'tis

Bill payable to *W. R.* or Order, is within the Cuſtom of Merchants.

* *Poſtea* 5. 'tis no Specialty; but if 'tis made payable to W. R. or * Bearer, 'tis not within the Cuſtom of Merchants, and therefore, when, upon ſuch a Bill, the Plaintiff declared, that the Defendant being a Merchant, had drawn a Bill according to the Cuſtom of Merchants, but had not paid the Money; this Declaration was held ill; and all this was reſolved in * Hodges and Steward's Caſe.

* 1 Salk. 125. *Poſtea* 5.

Williams *verſus* Feild. 5 Will. III. B. R.

Where the laſt Endorſee may bring an Action againſt any of the Endorſers.

(3.) RUled, that where a Bill is drawn payable to W. R. or Order, and he endorſes it to B. who endorſes it to C. and he endorſes it to D. the laſt Indorſee may bring an Action againſt any of the Endorſers, becauſe every Indorſement is a new Bill, and implies a Warranty by the Indorſer, that the Money ſhall be paid.

Clerke *verſus* Mundall. 3 Will. III. apud Guildhall coram Holt *Ch. Juſt.*

Where a Bill endorſed and not paid will not extinguiſh a precedent Debt.

(4.) W. R. having a Bill of Exchange, and being indebted to T. P. indorſes the Bill to him; afterwards he brought an Aſſumpſit againſt W. R. and upon Non Aſſumpſit pleaded, at the Trial he gave Evidence this Bill of Exchange indorſed to the Plaintiff, and that it had been ſo long in his Hands after it became due and payable, and therefore he accounted it as Money paid: But per Holt Ch. Juſt. a Bill, without Payment of the Money, ſhall never go in Satisfaction of a precedent Debt or Contract; if 'tis not Part of the Contract, that it ſhould be in Satisfaction, as if A. ſells Goods to B. and 'tis agreed between them, that A. ſhall have a Bill of Exchange in Satisfaction for the Goods, in ſuch Caſe B. is diſcharged, tho' the Money ſhould never be paid, becauſe the Bill it ſelf was Payment; but otherwiſe a Bill ſhall never extinguiſh a precedent Contract or Debt; 'tis true, if Part of a Bill of Exchange is paid, it ſhall only be a Diſcharge of ſo much of the old Debt.

1 Salk. 125. The Plaintiff declared on a *Cuſtom for the Bearer*, to bring an Action, if the Defendant demurs and doth not traverſe the Cuſtom, Judgment ſhall be againſt him.

Hodges *verſus* Steward. Paſch. 5 Will. III. B. R.

(5.) THIS Caſe is reported in 1 Salk. to which may be added, that this was an Action on the Caſe brought upon an Inland Bill of Exchange, in which the Plaintiff declared upon a ſpecial Cuſtom in *London* for the Bearer, to bring the Action, &c. and upon a Demurrer to the Declaration, beſides the other Points adjudged in this Caſe it was held, that the Defendant

dant having demurred, without traverſing the Cuſtom, he had thereby confeſſed there was ſuch a Cuſtom, tho' in Truth there was not, and for that Reaſon the Plaintiff had Judgment; for tho' the Court takes Notice of the Law of Merchants, as Part of the Law of England, yet they cannot take Notice of the Cuſtoms of particular Places; and this Cuſtom, as ſet forth in the Declaration, being ſufficient to maintain the Action, and the Defendant confeſſing it by his Demurrer, he hath given Judgment againſt himſelf.

Brough *verſus* Parkins. Mich. 2 Annæ, B. R.

(6.) CASE upon an Inland Bill of Exchange brought in the C. B. againſt the Drawer, and Judgment for the Plaintiff by Nil dicit; and now upon a Writ of Error in B. R. it was argued for the Plaintiff in Error, that the Declaration was ill, becauſe it did not appear therein that the Bill was proteſted; and ſince the late * Statute, no Action can be brought againſt the Drawer, unleſs a Proteſt is made as directed by that Statute, and this ought to be ſet forth in the Declaration, becauſe at Common Law the Party had no Remedy againſt the Drawer, except Notice was given to him of Non-payment of the Money by him on whom the Bill was drawn; ſo that now a Proteſt is neceſſary, or 'tis not; if 'tis neceſſary, it ought to be ſet forth in the Declaration; if 'tis not neceſſary, then the Party had the ſame Remedy before the Statute that he hath now, ſo that the Statute is of no Effect; on the contrary it was argued for the Plaintiff in the Action, that it doth not appear that the Bill was underwritten; for if it was not, then 'tis not within the Statute, and a Proteſt cannot be made without it; for in Caſes of Inland Bills, a Proteſt was not neceſſary at Common Law, as 'tis in Foreign Bills, but admitting a Proteſt in this Caſe is required by the Statute, yet it ought not to be ſet forth in the Declaration, but 'tis to be conſidered at the Trial; for if the Drawer had any Damage by the not proteſting it, and if ſuch Damage amounts to the Value of the Bill, 'tis a total Diſcharge to him, if leſs, 'tis a Diſcharge for ſo much: Holt Ch. Juſt. the Plaintiff muſt give convenient Notice to the Drawer of Non-payment of the Money in Caſes of Inland as well as of Foreign Bills of Exchange, for if the Drawer receives any Prejudice by the Plaintiff's Delay, he ſhall not recover; a Proteſt on a Foreign Bill is Part of its Conſtitution, but on Inland Bills it was not neceſſary before this Statute, at Common Law; and the Statute doth not take away the Plaintiff's Action for Want of a Proteſt, or make it a Bar to his Action, but only deprives him of that Intereſt, or thoſe Damages for not making a Proteſt, as he might have, if he

Mod. Caſes 80. Caſe againſt the Drawer of an Inland Bill good, without a Proteſt.

* 9 & 10 Will. 3. cap. 17.

he had made one; or to give the Drawer a Remedy against him by Way of Action for Costs and Damages, in not making a Protest, quod Powell Just. concessit, and that since the Statute a Protest was never set forth in the Declaration.

Yeoman *versus* Bradshaw.

Postea Executor 10. Bill of Exchange is no Specialty, therefore it shall be *Bona notabilia* where the Debtor is, and not where the Bill is.

(7.) PER Holt Ch. Just. a Bill of Exchange shall be Bona notabilia where the Debtor is, and not where the Bill is, for 'tis in Law no Specialty; for if an Executor pays Debts upon simple Contracts, or suffers Judgment to pass against him upon Actions on such Contracts, yet he may plead such Payment or Judgment in Bar to an Action on a Bill of Exchange, and such Bill is like an Award in Writing, which is no Chattel where the Award it self lies, and in Pleading such Award or a Bill of Exchange, 'tis never said hic in Curia prolat', which shews they are no Specialties, and so it was adjudged; tho' it was objected, that the Paper on which it was written was Evidence that it was a Debt, and that Trover and Conversion would lie for it, and consequently it must be Goods and Chattels, and therefore ought to be considered as Bona notabilia, where the Bill or Award was.

Anonymus. Pasch. 2 Annæ, B. R.

Action against the Accepter, where brought for Part of the Money, not good.

(8.) A Bill of Exchange was drawn on W. R. for 40 l. payable to O. W. or Order, W. R. accepts the Bill, and afterwards O. W. the Drawer endorses Part of it to the Plaintiff, who brought an Action against the Acceptor; adjudged, that it would not lie, because, by his accepting the Bill, he made himself liable only to one Action for the Whole, and not to several Actions for Part of the Money.

Anonymus. Mich. 10 Will. III.

Action doth not lie against the Indorser, without setting forth an Attempt to find out the first Drawer, or a Demand of the Money of him.

(9.) A Bill of Exchange being made payable to W. R. or Order, W. R. endorses it, B. the endorsee cannot sue W. R. unless he attempt to find out the first Drawer, or to demand it of him, for the Indorser is but a Warrantee that the Drawer should pay, and therefore liable only upon his Default: Per Holt Ch. Just. at Guildhall, and such Attempt must be set forth in the Declaration.

Anonymus: Mich. 10 Will. III. *at* Guildhall.

(10.) A Bank Bill, payable to W. R. or Bearer, was given to W. W. who loſt it, and it was found by a Stranger, who aſſigned it to C. upon a Valuable Conſideration; afterwards C. got a new Bill in his own Name. Et per Holt, Ch. Juſt. W. R. may have Trover againſt the Finder, for he had no Title, tho' a Payment to him had indemnified the Bank; but not againſt C. becauſe of the Conſideration, which, by Courſe of Trade, creates a Property in the Aſſignee or Bearer.

Bill payable to Bearer loſt, and found by a Stranger, who aſſigned it to *C.* good, but Trover lies againſt the Finder.

BISHOP.

(1.) ALL Biſhopricks in England were antiently Donative by the King; and there was good Reaſon for it, for he endowed them with Lands and Revenues, and Baronies, and therefore it was reaſonable he ſhould be the Patron. The Ceremony then in Uſe, was Inveſtiture per Annulum & Baculum; the one was a Symbolical Repreſentation of the Biſhops Spiritural Marriage with the Church, the other of his Paſtoral Care and Charge over the Flock of Chriſt.

(2.) But after many Conteſts between the Kings of England, and the Popes, it was * agreed, in the Reign of King John, That the King ſhould permit a free Election by the Chapter, but founded on his Conge de eſlire (i. e.) a Licence to give them Leave to chooſe a Biſhop upon any Vacancy, and that the new elected Biſhop ſhould not have his Temporalties, till he ſwore Allegiance to the King; but that Confirmation and Conſecration ſhould be in the Power of the Pope, by which Means he gained, in Effect, the Diſpoſal of the Biſhopricks in England.

* The Original Charter of this Agreement is in *Mat. Paris* and in *Eadmerus*.

(3.) And thus it continued till the * 25th Year of the Reign of H. 8. in which Year the Papal Juriſdiction was taken away by Statute Quod Vid.

25 H. 8. cap.

(4.) Afterwards, by the Statute 1 Ed. 6. All Biſhopricks were made Donative, as formely they were; but by a Statute made 8 Eliz.

1 Ed. 6. cap. 1.

Jones 160. Latch 37. 8 Eliz. the Statute 25 H. 8. was reſtored, and Biſhopricks in England were again made Elective by the Conge d'eſlire; but in Ireland they are Donative by Letters Patents at this Day.

(5.) The Manner of making a Biſhop, as well in Caſe of Tranſlation as new Creation, is thus;

When the See is Vacant, the Dean and Chapter certify it to the King in Chancery, and pray the King's Licence to elect a Biſhop; thereupon the King grants his Conge d'eſlire ſuch a Perſon, naming him, and ſo they proceed to an Election; and when that is done, they certify it to the King, to the Archbiſhop, and to the Party elected, and then the King by his Letters Patents gives the Royal Aſſent, and Commands the Archbiſhop to confirm and conſecrate him; whereupon the Archbiſhop examines the Election, and the Party, and then confirms the Election, and conſecrates him.

(6.) This is the Manor of Proceeding in Creations, and it holds likewiſe in Caſes of Tranſlations, excepting only, that the Perſon tranſlated is not conſecrated de novo; for a * Conſe-
* Jones 160. cration is like an Ordination (i. e.) 'tis an indelible Character, and holds good for ever.

(7.) Heretofore, when a Biſhop was to be tranſlated, there was no Election to the new See, for the Rule in the Canon Law is, Electus non poteſt eligi; and becauſe it was pretended, that the Biſhop was married to the firſt Church, which Marriage could not be diſſolved but by the Pope, therefore a Petition was made to him, who conſenting to it, then, and not before, the Biſhop was tranſlated to his new See; and this was ſaid to be by Poſtulation, but rather it may be ſaid to be by Uſurpation, for 'tis
Jones 160. expreſly againſt the Statutes 16 R. 2. and 9 H. 4. cap. 8. and Tranſlations are ever by Election, and not by Poſtulation.

Jones 162. (8.) When a Biſhop is tranſlated, the old See is not void by the Election to the new one, until the Election is confirmed by the Archbiſhop; for tho' he is elected, yet the King may not conſent, or the Archbiſhop may not confirm, and 'tis not reaſonable that the Biſhop ſhould looſe his old Preferment, till he hath gained a new one; and ſo 'tis in Caſe of Creation, he is not compleatly Biſhop till Conſecration.

(9.) For, as there are four Things to compleat a Parſon (viz.) Preſentation, Admiſſion, Inſtitution and Induction, ſo there are four Things analogically requiſite to compleat the Biſhop; the firſt is Election, and this reſembles the Preſentation; the next is Confirmation, which reſembles Admiſſion; the next is Conſecration,

tion, and this resembles Institution; and the last is Installation of a Bishop, or Inthronization of an Archbishop, which resembles Induction.

(10) Originally the Archbishop was Bishop over all England, as Austin was, per Coke and Dodderidge. 1 Roll. Rep. 328.

(11.) Bishops did sit and had a Vote in Parliament in the Time of the Saxons, but it was not ratione Baronie, but ex Privilegio personali, as they were Bishops, for they were not Barons till the Norman Reign; for in the Reign of the Saxons, they were free from all Services and Payments, excepting only to Castles and Bridges; but William, called the Conqueror, deprived them of this Exemption, and instead thereof turned their Possessions into Baronies, and made them subject to the Tenures and Duty of Knights Service. Seld. Tit. Honour 576.

BONA NOTABILIA.

See Executor 10.

BONDS.

Cromwell *versus* Dresdale. Mich. 8 Will. III.

(1.) PER Holt Ch. Just. If the Delivery of the Bond was after the Date, the Plaintiff must declare generally of a Bond dated on such a Day, but with a primo deliberat' on such a Day; for otherwise it shall be intended to be delivered on the Day 'tis dated. Where the Plaintiff must declare on the Delivery of a Bond after the Date.

Henderſon *verſus* Foſter. Hill. Will. III. B. R.

Where *ſex triginta* ſhall be taken as one Word.

(2.) IN an Action of Debt, the Pliantiff declared on a Bond ſolvend' triginta & ſex libras; and upon Oyer of the Bond it appeared, ſolvend' ſex triginta libras, which is ſix Times as much as the Plaintiff had declared for (viz.) 180 l. and for this Variance the Defendant demurred to the Declaration, but it was held good; for ſex trigint' ſhall be taken as one Word, like a Bond dated tres viginti dies, which was taken to be on the 23d Day, &c.

Boughton *verſus* Shaw. Paſch. 5 Will. III.

Bond given to the Plaintiff himſelf to appear, &c. is not within the Statute.

(3.) DEBT upon Bond conditioned, that whereas W. R. was arreſted at the Suit of the Plaintiff, if therefore he the ſaid W. R. ſhould appear and put in Bail at the Return of the Writ, or ſurrender himſelf to the Serjeant, then the Bond ſhould be void. The Defendant pleaded the Statute of H. 6. and that this Bond delivered to the Serjeant, and taken by him in the Name of the Plaintiff, was for Eaſe and Favour; and upon a Demurrer to this Plea, per Curiam, a Bond given by the Party arreſted, to the Plaintiff himſelf, or by a Stranger, to the Plaintiff himſelf, for the Enlargement of the Party arreſted, is not within the Statute, but good.

Allen 21, 42. Saund. 291. Jones 303. Sid. 234, 272, 420.

(4.) Three Joint Obligors, an Action was brought again two, they may plead in Abatement, that another ſealed the Bond, who is ſtill alive, and not named; ſo 'tis of a Recogniſance before a Mayor or Recorder, but they cannot crave Oyer and Demurrer for Variance, for perhaps all three did not ſeal, and ſo the Court will intend; but 'tis otherwiſe of a Recogniſance before a Judge; for in a Scire facias, the Defendant may either plead it in Abatement, or crave Oyer and Demurrer for Variance.

Sid. 238.

(5.) So where there are three Joint Obligors, and one of them dies, the Plaintiff muſt ſhew, that one is dead, for otherwiſe he cannot ſue the two Survivors, and the Executor of him who is dead.

Yel. 177.

(6.) Where a Bond is made to A. B. and C. conditioned, that W. R. ſhall pay 20 l. to W. W. there all of them muſt join in the Suit, for they are but as one Obligee; and if one of them ſhould die, the two Survivors muſt join in the Action, tho' they have no Intereſt in the Money.

(7.) Two ſeal and deliver a Bond to W. R. and afterwards by Conſent of all Parties, a Third is added, and he ſeals and delivers the Bond: adjudg'd this did not make the Bond void, but that all three are now bound; but it had been otherwiſe if the third Man had been added without the Conſent of the Obligee. 2 Lev. 35. 3 Cro. 626.

(8.) Debt upon a Bond of 50 l. which upon Oyer appeared to be in quanto ginta libris; adjudged ill, becauſe of the Variance and Inſenſibility of the Word. 2 Lev. 166.

(9.) Three were jointly and ſeverally bound, and an Action of Debt being brought againſt one of them alone, he craved Oyer of the Bond, and pleaded that the Seal of one of them was torn off; and upon a Demurrer this was adjudged a good Plea, becauſe 'tis not the ſame Bond as it was at firſt. 2 Lev. 220.

(10.) Debt upon Bond, in which the Plaintiff declared, that the Defendant was bound to him the Plaintiff W. R. in 50 l. upon Non eſt factum pleaded, the Jury found the Bond in hæc verba, and that it was made to W. R. and that the Words nuper Vic. Oxon' were ſince interlined: Et per Curiam, the Interlineation might be material, but it doth not appear to be ſo, for non conſtat, whether it was to him, or not, colore Officii, and therefore the Verdict is for the Plaintiff; but if inſtead of Non eſt factum, the Defendant had craved Oyer, and demurred, then it had been againſt the Plaintiff for this Variance. 1 Roll. Rep. 40.

Placket *verſus* Greſham. Mich. 9 Will. III:

(11.) IN this Caſe it was held, that where a Sheriff takes a Bond as a Reward for doing a Thing, 'tis void, for it may be to warrant him in the Breach of his Duty, but if 'tis to ſave him harmleſs in doing a Thing which 'tis his Duty to do, then 'tis good. Where a Bond taken by a Sheriff is good, where not.

BY-LAWS.

Hob. 211. (1.) IN all Corporations there is a special Clause, by which they have Power to make By-Laws, but such enabling Clauses are needless, because they are included in the very act of incorporating, as a Power to sue, purchase, or the like; for as the natural Body hath Reason to govern it self, so Bodies incorporate must have Laws, which are in Nature of political Reason to govern themselves.

Hob. 211. 5 Rep. 61. (2.) The Inhabitants of a Town or Parish may make By-Laws for repairing their Church or Highways, and this without any Custom or Prescription so to do, because these are Necessities to which the Law hath made them Subject as they are a Parish; and therefore the Law enables them to supply these Occasions, as if they were incorporated; but they cannot make a By-Law for regulating a Common, without a Custom enabling them so to do, and such Custom must be pleaded.

1 Vent. 167. (3.) But a By-Law in a Manor binds all the Tenants of that Manor, because they are supposed to dwell there.

1 Roll. Rep. 5. (4.) A By-Law that none shall exercise his Trade in such a Mill, until first allowed so to do by such or such Persons, is not good, because 'tis in the Power of these Persons to hinder him.

1 Roll. Rep. 312. (5.) But a By-Law in London not to use a Hot Press, under the Penalty of 5 l. nor to make one under the Penalty of 10 l. is good, because 'tis dangerous in respect of firing, and 'tis a Deceipt to the Buyers.

(6.) A By-Law under such a Penalty, and whosoever shall refuse to pay it, to be committed, is naught, because nullus liber homo imprisonetur nisi per legale judicium, and no Assent can change this Law; but if the By-Law had been, that the Penalty should be levied by Distress, an Action of Debt would have laid. 2 Vent. 183. 5 Rep. 64. Clerk's Case, but not to be levied by Distress and Sale of Goods.

Jones 162. (7.) The Town of Boston, by their Charter, claimed a Power to make By-Laws or Orders, and to commit for not obeying them;

them; and this in a Quo Warranto was held to be ill, according to Clerk's Case.

8. All By-Laws must be subject to the Laws of the Realm, and subordinate to them; therefore, if they are against the Laws and Statutes, they are void. Hob. 211. 5 Rep. 63.

BRIDGES.

(1.) These are to be repaired by the County, unless the Locus in quo, &c. is bound to repair it, and that may be by Toll or Tenure, but not by Prescription; but if it lie Part in one County and Part in another, each County is respectively chargeable for so much of the Bridge as lies therein, and that may be by Toll, Tenure, or Prescription, or unless some private Person is bound to repair it, and that may be by Toll or Tenure, but not by Prescription.

(2.) Indictment for not repairing a Bridge was adjudged naught, because non constat in what County it lies, and because it did not set forth what kind of Bridge, (viz.) whether Foot, Horse, or Cartbridge, and because it charged the Defendant ratione Manerii sui, when it should be ratione tenuræ Manerii sui, so that it did not appear that he was Owner of the Manor. Stiles 109. Spiller's *Case*.

(3) Information against the Inhabitants of the County of Nottingham, for not repairing a Bridge over the Trent, two of the Inhabitants, in the Name of themselves and the rest, pleaded, that A. and B. Owners of Whiteacre, ought to repair it ratione tenuræ, and traverse, that the Inhabitants of the County have or ought to repair; the Attorney-General replied, that the Inhabitants, &c. ought to repair it, and traversed that A. and B. ought; they rejoin, that A. and B. ought to repair, and thereupon they were at Issue; and at a Trial by a Middlesex Jury, the Defendants were found guilty upon the last Traverse, quod nota. 2 Lev. 112.

The Defendant, as Lord of a Manor, used to repair Lodden-Bridge, he alien'd the Manor to several, (viz.) Part to A. and Part to B. and afterwards B. was indicted for not repairing this Bridge as he ought ratione tenuræ, he pleaded, that A. and the other were Purchasers with him of the same Lands held of that Manor: Sed per Curiam, we will compel you to repair this Bridge, Jones 273.

Bridge, because 'tis a Thing of Necessity, and afterwards you may seek for Contribution amongst the rest, for the repairing shall not stay till you determine who shall be Contributors.

CERTIORARI.

The Queen versus Dixon. Mich. 2 Annæ, B. R.

1 Salk. 180. Mod. Cases 61.

Certiorari to remove the Indictment, but not the Conviction.

(1.) There is a short Note of this Case in 1 Salk. which see, the Case was thus:

ſſ. The Defendant was indicted for selling five Yards of Muslin, affirming it to be worth 5 s. per Yard, whereas it was not worth 2 s. 6 d. per Yard; upon Not guilty pleaded, the Defendant was found guilty, and afterwards brought a Certiorari, and moved to quash this Indictment: Sed per Holt Ch. Just. This Certiorari was only to remove the Indictment and not the Conviction; besides, here is no Day in Court for the Defendant, as it ought to be upon the Return of a Certiorari, to remove an Indictment after Conviction, he should have made Use of this Certiorari, before Conviction, whereupon he now moved for a Certiorari to remove both the Indictment and Conviction, tho' a Writ of Error might have been proper, yet the Court granted a Certiorari specially giving a Day here by it to the Party.

The Queen versus Brown & al'. Mich. 12 Annæ, B. R.

Joint Indictment against 3, another Indictment against one of the 3, and another against 2 of the 3 and a Stranger,

(2.) William Brown, Francis Wood, and Leonard Fosbrook, were jointly indicted at the Sessions; there was another Indictment against Brown alone, and another against Wood and Fosbrooke, and one W. R. and a Certiorari was awarded to remove all Indictments, Unde iidem Willielmus, Franciscus & Leonardus indictati sunt, without saying, vel eorum aliquis indictatus existit: And per Curiam, none of these Indict-

and a *Certiorari* to remove all Indictments against the Three, without saying, *vel eorum aliquis.*

ments

ments are removed, but only that Joint Indictment first mentioned against Brown and others, and the Justices below may proceed on the other without any Contempt.

Anonymus. Mich. 8 Annæ.

(3.) CErtiorari to remove an Order made upon W. R. concerning Foreign Salt, and the Order being returned, it appeared to be for Salt only; and a Motion being made, to quash the Order for a Fault therein, the Attorney-General Northey objected against the Certiorari, that it was misconceived, for there was no such Order to be removed, quod Curia concessit; for a Certiorari to remove an Order made concerning Foreign Salt, will not remove an Order made concerning Salt generally, it should have been to remove all Orders concerning W. R. for which Reason it was quashed.

An Order was made concerning Foreign Salt, and the *Certiorari* was to remove an Order concerning Salt.

Crosse *versus* Smith. Hill. 1 Annæ B. R.

(4.) UPON a Certiorari out of the Common Pleas to the Court of Ely, and this Writ being allowed by the Court, and they afterwards proceeding thereon, a Writ of Error was brought, and that Matter was assigned for Error. The Defendants plead a Grant of Conusance of Pleas to the Bishop of Ely, and an Allowance thereof in B. R. Anno 21 Ed. 3. and that the Cause did arise within that Jurisdiction; and this being returned on the Certiorari, and a Demurrer to it, Holt, Ch. Just. held, that there are three Sorts of Inferior Jurisdictions.

1 Salk. 148. No Jurisdiction can withstand a *Certiorari*.

(1.) One whereof is Tenere placita, and this is the lowest Sort, for 'tis only a concurrent Jurisdiction, and the Party may sue there, or in the King's Courts if he will.

(2.) The second is Conusance of Pleas, and by this a Right is vested in the Lord of the Franchise to hold the Plea, and he is the only Person who can take Advantage of it; for the Defendant cannot plead this to the Jurisdiction of the Court, but the Lord must come in and claim his Franchise, and there is no other Way to get the Cause from him; neither is the Court of B. R. intirely outed thereupon, for Day is given by the Roll in B. R. to the Party to be below at such a Day, where both Parties are sent down together, with the Tenor of the Record here, for them to proceed there; and if Justice is done 'tis well, if not, the Plaintiff shall have a Resummons for any Delay or Misbehaviour below, for the Cause is still under the Authority and Inspection of this Court, and the Lord's Benefit is all that is to be considered; 'tis true, these Jurisdictions are a Grievance, and

27 H. 8. cap. 24.

Com-

Complaints have often been made against them, and the Common Law, to prevent Oppression, hath always allowed Certiorari's to these Jurisdictions.

(3.) The third Sort is an Exempt Jurisdiction; as where the King grants to a great City, that the Inhabitants thereof shall be sued within their City, and not elsewhere, this Grant may be pleaded to the Jurisdiction of this Court, if there be a Court within that City which can hold Plea of the Cause, and no Body can take Advantage of this Privilege but a Defendant, for if he will bring a Certiorari, that will remove the Cause; but he may waive it if he will, so that the Privilege is only for his Benefit.

Thus there is no Jurisdiction which can withstand a Certiorari, even in a Case of a Customary Proceeding by Foreign Attachment; if the Defendant cannot find Bail below, he may bring a Certiorari, and upon putting in Bail above, the Cause shall go on there.

Parish of St. Mary *in* Devises. Pasch. 1702.

Certiorari to remove an Order *cujus quidem tenor*, instead of *ordo*, not good.

(5.) UPON a Certiorari to remove an Order, the Return was, Cujus quidem tenor sequitur in hec verba, when it should be Qui quidem ordo sequitur in hec verba, and for that Reason it was quashed, and upon Motion, a new Certiorari was granted.

The Queen versus Whittle. Pasch. 4 Annæ.

Certiorari to remove an Order, need not be signed by a Judge, but the Fiat must.

(6.) CErtiorari to remove an Order of Sessions, was superseded, because Emanavit biduo antea aliquid fiat was signed by a Judge; for per Curiam, if it be to remove an Indictment, both Certiorari and Fiat ought to be signed, if to remove an Order, the Certiorari need not be signed, but the Fiat must.

Anonymus.

Variance between the Indictment, the *Certiorari*. Antea 3.

(7.) CErtiorari to remove an Indictment de duobus equis felonice abductis, and the Indictment was, de uno equo furtive abducto; per Curiam, nothing is before the Court, neither have they any Warrant to proceed in this Case, for there is a Variance between the Indictment and the Writ.

CHALLENGES.

Charnock's *Case*.

(1.) CHarnock, King and Keys, were indicted for High Treason, in conspiring the Death of the King; they were denied Counsel, but allowed Pen, Ink and Paper, and having severally pleaded Not guilty, Holt Ch. Just. told them, that each of them had Liberty to challenge thirty-five of those who were returned upon the Panel to try them, without shewing any Cause; but that if they intended to take this Liberty, then they must be tried separately and singly, as not joining in the Challenges, but if they intended to join in the Challenges, then they could challenge but thirty-five in the whole, and might be tried jointly upon the same Indictment; accordingly they all three joined in their Challenges, and were tried together and found guilty.

Where three may join, or sever in their Challenge.

Anonimus.

(2.) RUled, that where there is a Writ of Enquiry for Damages, the Jurors cannot be challenged, as other Jurors may, because this is only an Inquest of Office; but yet 'tis in the Discretion of the Sheriff to admit such a Challenge, if it appear to be a good Cause of Challenge.

Jurors in a Writ of Inquiry cannot be challenged.

(3.) Challenge to the Array, for that the Sheriff had not taken the Test. Sed per Curiam, this is no good Cause of Challenge, for he is still Sheriff de facto, and it would be very hard for Plaintiffs in every Trial to prove, that the Sheriff had taken the Test.

2 Vent. 58.
1 Cro. 369.

(4.) When the Jury are of a Town Corporate, 'tis no Challenge, that they are not Freeholders; but where they are not of any Corporation, 'tis a good Challenge.

1 Vent. 366.

(5.) Information against the Defendant for Forgery, one of the Jurors was challenged, for that the Prosecutor was lately entertained

1 Vent. 309.
1 Cro. 663.

tertained at his House, and this was allowed a good Challenge to the Favour.

1 Cro. 413. Sir *Christopher Blount's* Case.

(6.) Information of Intrusion, a Juror was challenged for Want of Freehold, he having only 15 s. per Annum: But per Curiam, any Freehold was sufficient at Common Law; and tho' the Statute of H. 5. requires 40 s. and the 27 Eliz. 4 l. where the Damages exceed 40 Marks, yet this is only between Party and Party, and not where the Queen is concerned.

CHANCERY.

Mathews *versus* Courthope.

The Testator made a Stranger, and no Relation to him, Executor, and gave him 50 *l.* he shall not have the *Residuum.*

(1.) THE Testator made one Executor, who was no Relation to him but a meer Stranger, and gave him 50 l. for his Care in the Execution of his Will; the Plaintiff being next of Kin, exhibited his Bill for the Residuum of the Estate, and no Counsel appearing on the other Side, he had a Decree nisi causa. For per Turton Just. with whom the Bar agreed, the Executor in such Case shall not have the Residuum, after Debts and Legacies paid, but the next of Kin to the Testator; and so it was said it had been decreed in the like Case, between Cordall and Cordall; 'tis true, if the Executor had been nearly related to the Testator, it might have been otherwise; but even in such Case, if there are other Relations, in equal Degree with him, and are poor and indigent, Equity in such doubtful Cases, will give the Residue amongst them.

Aston *versus* Adams. Pasch. 8 Will. III.

Prohibition to the Plaintiff in Chancery, who had brought a Bill on an *Indebitatus Assumpsit.*

(2.) MOtion for a Prohibition to one Adams, who had exhibited a Bill in Chancery: The Case was thus; Aston stood engaged to Adams by Simple Contract, to pay him 10 l. for curing his Son, &c. and Adams brought a Bill in Chancery

for this 101. ſuggeſting that the Agreement was not in Writing, and that the Witneſſes who could prove it were either dead or beyond-Sea; the Defendant Aſton pleaded, that the Agreement was made in the Preſence of W. R. now living in Holland, and traverſed the reſt of the Suggeſtion; and this being over-ruled in Chancery, Aſton now moved for a Prohibition, becauſe this is no more than a meer Indebitatus Aſſumpſit at Common Law; and if this Proceeding ſhould be allowed, it would tend to the Subverſion of the whole Frame of the Common Law; beſides, the granting a Prohibition would prevent the Claſhing of Juriſdiction; and there are ſeveral Precedents in the Regiſter of Prohibitions, ne ſequatur ſub ſuo periculo: The Court appointed to hear Counſel on both Sides, but the Cauſe was agreed. 1 Ch. Rep. fo. 63.

Anonymus. Hill. 9 Will. III.

(3.) THE Teſtator being ſeiſed of Lands, and poſſeſſed of Goods, deviſed Black-acre to be ſold, and White-acre to be mortgaged, for Payment of his Debts, and died ſo much in Debt, that if both Parcels were ſold, the Money ariſing by ſuch Sale would only pay the Debts, with a ſmall Overplus, accounting alſo the Money ariſing by the Sale of his Goods and Chattels; in this Caſe it was decreed, that all ſhould be ſold, that the Mortgages and Judgments ſhould be firſt ſatisfied, and that afterwards, if there ſhould be ſufficient of the perſonal Eſtate to pay the Bonds, then to pay the ſame, or ſo much of them as the perſonal Eſtate would extend to pay; and that ſo much of the Bonds as ſhould remain unpaid, ſhould come in equal Degree with the Debts upon ſimple Contract, and be a Charge upon the Lands, for as to them, Bonds have no Preference in a Court of Equity; 'tis true, as to Goods and Chattels, Bonds will have a Preference, becauſe the Executor by Law is bound to prefer them before Debts on ſimple Contract. Mortgages and Judgments to be paid by Sale of Lands, and Bonds and Debts on ſimple Contract out of the perſonal Eſtate.

Feverſtone *verſus* Scetle. Hill. 1697.

(4.) DEcreed by Somers Lord Chancellor, that where a real Eſtate is upon an equitable Title, made ſubject by this Court to the Payment of Debts, and it appears that there is a ſufficient legal Eſtate, (i. e.) Goods and Chattels, to ſatisfy Debts upon Specialties, for which the Creditors may have Remedy at Law againſt the Executor; in ſuch Caſe the Debts upon ſimple Contract, for which there is no Remedy at Law, ſhall be firſt ſatisfied out of the equitable Eſtate. Debts upon ſimple Contract to be ſatisfied out of the equitable Eſtate.

Pope & al' *verſus* Garland. Paſch. 11 Will. III.

Deviſe of Copyhold good without a Surrender.

(5.) DEcreed, that all Deviſes by Copyholders, for the Uſe of Children or Creditors, and all Charges made by them upon their Lands, for the Benefit of Children or Creditors, will be good in a Court of Equity, tho' there was no Surrender to theſe Uſes.

Phillipſon *verſus* Phillipſon. Hill. 3 Will. III. B. R.

Where an Heir ſhall be relieved againſt the Penalty of a Bond.

(6.) DEBT againſt an Heir upon the Bond of his Anceſtor: The Defendant pleaded Riens per Deſcent, and at the Trial it was found againſt him, that he had 5 l. Aſſets per Deſcent, the Chancery will relieve him againſt the Penalty of the Bond, but not againſt the Penalty of his falſe Plea, becauſe it was a voluntary Falſity.

Anonymus. Hill. 9 Will. III.

Where more Money is lent to the Mortgagor on Bond, he ſhall not redeem without paying the Bond.

(7.) DEcreed by Somers Lord Chancellor, that where the Mortgagee lends more Money upon Bond to the Mortgagor, he ſhall not redeem till he pays the Bond-Debt as well as the Money due on the Mortgage; but if he Mortgage his Equity of Redemption to another, the ſecond Mortgagee ſhall not be affected with the Bond, for 'tis but a perſonal Charge upon the Mortgagor.

Anonymus.

Bill againſt a Man and his Wife abated by the Death of him.

(8.) A Bill was exhibited againſt Husband and Wife, for Matters chiefly concerning the Wife, they both put in their Anſwer, and then the Husband died, this is an Abatement of the Cauſe, ſo that the Plaintiff ſhall not proceed upon a Bill of Revivor, for the Widow ſhall not be compelled to abide by the Anſwer of her Husband made for her, or which he made whilſt ſhe was ſub poteſtate Viri, but ſhe may abide by it if ſhe will, and if ſhe doth, the Plaintiff may proceed, and the Decree ſhall bind her.

Anonymus.

(9.) A Bill was exhibited to discover a Title, and whether there was an Equity of Redemption, the Defendant answered, that he was a Purchaser for a valuable Consideration, and absolutely bought the Estate of such a Person, and had no Notice of any Title; and this was adjudg'd a good Plea. See Hardres 510.

Purchase for a valuable Consideration without Notice of any Incumbrance, a good Plea.

Daris's *Case*.

(10.) A Man contracted for the Purchase of Lands, but before the Conveyance was made he died, having devised the Land, &c. Et per Curiam, the Devise is good, because the Vendor, after the Contract, stood Trustee for the Vendee.

Contract for a Purchase, and before the Conveyance made he died, the Vendor is a Trustee for the Vendee.

Church and Church-wardens.

(1.) IN a Prohibition it was ruled, that the Plaintiff cannot entitle himself to a Seat in navi Ecclesiæ by Prescription generally, without shewing some Special Matter, as Repairing, &c. otherwise if it be an Isle, but if he entitle himself to a Seat, in navi Ecclesiæ generally, he must give repairing in Evidence, but an Isle may be upon the Land of a private Person.

Seats in the Church.

Sid. 88, 203.

1 Lev. 71.

(2.) In Trespass for breaking and cutting in Pieces his Pew, and taking it away; the Defendants pleaded, that they were Church-wardens, and that the Plaintiff had built it in the Church without License, per quod, &c. Et per Curiam, the Trespass is confessed, for tho' they may remove the Seat, they cannot cut the Timber and Materials into Pieces.

Noy 108. Gibson's *Case*.

(3.) If one and his Ancestors have, Time out of Mind, repaired an Isle in a Church, and sate there with his Family, and buried there, 'tis good Evidence that the Seat is proper and peculiar to him, but then he must repair it at his own Charge, and not with

Noy 104. Day's *Case*.

with the Help of the Parish, for if he doth not, the Ordinary may appoint who shall sit there.

Noy 133. *Sir* W. Hall's *Case.*

(4.) The chief Seat in the Chancel belongs to the Impropriator of common Right; and by Consequence to the Farmer of the impropriate Tithes, but by Prescription it may belong to another.

Burials. Noy 145.

(5. The Church-Book for Burials and Christenings began in the thirtieth Year of H. 8. at the Instance of the Lord Cromwell.

Noy 104.

(6.) The Ordinary and Church-wardens cannot licence one to bury in the Church, but it ought to be by the Parson, because the Freehold is in him.

Anderton *versus* Walker.

2 Lutw. Custom to pay for Baptism and Burials, triable at Law. * Cap. 13.

(7.) ALL Offerings which are due to the Vicar for Sacraments, Marriages, and Burials, and payable to him by the Laws and Customs of the Realm, are confirmed by the Statute * 2 Ed. 6. but then such Custom must be tried in the Temporal Courts; therefore, where the Curate of Bridlington libelled against T. S. for not paying a Shilling for baptising his Child, setting forth in his Libel a Custom in the said Parish for every Parent so to do, &c. the Defendant suggested for a Prohibition, that by Law no Man ought to pay for baptising his Child, &c. against his Will, that Customs and Prescriptions were properly triable at Law, and that the Curate, &c. had libelled against him, &c. setting forth the Custom as aforesaid, and a Prohibition was granted.

Thompson *versus* Davenport.

2 Lutw. Custom to pay Money for marrying, triable at Law.

(8.) SO where the Plaintiff libelled against the Defendant, setting forth a Custom in the Parish of Elington in Derbyshire, that every Woman, who is a Parishioner, and dwelleth there, and marrying with a Licence, their Husbands at the Time of the Marriage, or soon after, shall pay to the Vicar 5 s. as an accustomed Fee, and so brings his Case within that Custom; the Defendant suggested for a Prohibition, that all Customs are triable at Common Law, and that the Plaintiff had libelled against him, setting forth the Custom as aforesaid, &c. and a Prohibition was granted.

Parker *verſus* Clerke.

(9.) THE Clerk of a Pariſh libelled againſt the Church-wardens, for ſo much Money due to him by Cuſtom every Year, and to be levied by them on the reſpective Inhabitants in the ſaid Pariſh; and after Sentence in the Spiritual Court, the Defendants ſuggeſted for a Prohibition, that there was no ſuch Cuſtom as the Plaintiff had ſet forth in his Libel; it was objected, againſt granting the Prohibition, that it was now too late, becauſe it was after Sentence, eſpecially ſince the Cuſtom was not denied; for if it had, and that Court had proceeded, then, and not before, it had been proper to move for a Prohibition. But per Holt Ch. Juſt. 'tis never too late to move B. R. for a Prohibition, where the Spiritual Court had no Original Juriſdiction, as they had not in this Caſe, becauſe a Clerk of a Pariſh is neither a Spiritual Perſon, nor is this Duty in Demand Spiritual, for 'tis founded on a Cuſtom, and by Conſequence triable at Law; and therefore the Clerks may have an Action on the Caſe againſt the Church-wardens, for neglecting to make a Rate, and to levy it, or if it had been levied, and not paid by them to the Plaintiff.

Mod. Caſes 252. Where the Spiritual Court hath not an Original Juriſdiction, 'tis never too late to move for a Prohibition.

The Churchwardens of St. Bartholomew's *Caſe.* Mich. 12 Will. III. B. R.

(10.) ONE Fiſhburne left 25 l. per Annum, for the Maintenance of a Weekly Lecturer, and appointed, that the Lecturer ſhould be choſen by the Pariſhioners, and to preach on any Day in every Week as they ſhould like beſt. The Pariſhioners fired on Thurſday, and choſe a Lecturer every Year; and now Mr. Turton being Lecturer, and the Pariſh having choſen Mr. Rainer, the other would not ſubmit to the Choice, whereupon the Churchwardens ſhut Turton out of the Church; afterwards the Biſhop of London determined in his Favor, and granted an Inhibition and Monition for that Purpoſe. And per Holt Ch. Juſt. a Prohibition was granted to try the Right; 'tis true, a Man cannot be a Lecturer without a Licence from the Biſhop or Archbiſhop; but their Power is only as to the Qualification and Fitneſs of the Perſon, and not as to the Right of the Lectureſhip, and the Eccleſiaſtical Court may puniſh the Churchwardens, if they will not open the Church to the Perſon, or to any one acting under him, but not if they refuſe to open it to any other.

The Archbiſhop or Biſhop muſt licence a Lecturer, but they cannot determine his Right to the Place.

The

The Queen verſus Guiſe. Mich. 2 Annæ.

Mod. Caſes 89. Return of a *Mandamus*, that the Churchwardens were not *debite electi*, without ſaying *nec eorum aliquis*, not good.

A Mandamus was granted to ſwear two debite electi Churchwardens of, &c. The Return was, that they were not duly elected, but did not ſay, nec aliquis eorum, and for that Reaſon it was quaſhed, for he who makes the Return muſt comply with the Writ as far as he can, and if one of the two is duly elected, as where the Pariſh claims a Right to chooſe one Churchwarden, and the Parſon another, they ought to ſwear one, and to return the Special Matter as to the other; that if the Pariſhioners have only a Right to chooſe one, and they chooſe two, the Election is void; but if two are choſen by the Pariſh by equal Voices, when they ought to chooſe but one, in ſuch Caſe they cannot tell which to ſwear into the Office, but then they muſt return all this Special Matter; ſo if the Pariſhioners are to chooſe and preſent them to the Parſon, who is to chooſe one of them, and they both bring a Mandamus, that Matter may be returned, for they cannot tell which to ſwear.

Britton *verſus* Standiſh. Trin. 3 Annæ.

Mod. Caſes 182. 1 Salk. 166. A Pariſhioner is not bound to come to his own Pariſh Church, if he goes to any other.

* 1 Eliz. cap. 2. Par. 14. Linw. 8, 143, 184, 227. Spar. 78.

3 Jac. 1. cap. 4. Par. 27. Spelm. Concil. 1 Part 193. 2 Part 141. 1 And. 138. 2 Cro. 480.

(12.) Standiſh, the Parſon of H. libelled againſt Britton, for not coming to his Pariſh Church on Sundays, and for not receiving the Sacrament at Eaſter: The Plaintiff ſuggeſted for a Prohibition, that the Bounds of Pariſhes and the Conſtructions of Statutes, belonged to the Juriſdiction of the Temporal Courts, &c. The Queſtion was, whether a Pariſhioner is bound by Law to come to his own Pariſh Church, or whether he is excuſed if he go to ſome other Church, as it appear'd the Plaintiff did? It was inſiſted againſt the Prohibition, that by the Statute * 1 Eliz. every Pariſhioner is obliged to come to his Pariſh Church, which Statute is ſtill in Force, and not alteted by any ſubſequent Act, but only by the Act of Toleration in Reſpect to Diſſenters; on the other Side it was admitted, that the Words of the Statute 1 Eliz. are, that every Pariſhioner ſhall repair to his Pariſh Church, but that thoſe Words were corrected or explained by ſome ſubſequent Statutes; as for Inſtance, by the Statute * 3 Jac. by which every Pariſhioner is required to repair to his Pariſh Church, or to ſome other Church; 'tis likwiſe corrected by the Act of Toleration. Holt Ch. Juſt. Pariſhes were inſtituted for the Eaſe and Benefit of the People, and not of the Parſon; and if every Pariſhioner is obliged to go to his Pariſh Church, then the Gentlemen of Gray's-Inn and Lincoln's-Inn muſt no longer repair to their reſpective Chapels, but to their Pariſh

Churches, otherwiſe they may be compelled ſo to do by Eccleſiaſtical Cenſures. But per Powell Juſt. the Spiritual Courts have always exerciſed this Juriſdiction, and after ſo long Uſage, it ought not now to be queſtioned; and as for the Gentlemen of Gray's-Inn and Lincoln's-Inn, they have likewiſe uſed to repair to their Chapels, and therefore may be exempted from coming to their Pariſh Churches, and this by Vertue of an Uſage againſt Uſage: Now the Reaſon why Pariſhioners muſt come to their Pariſh Churches, is not (as hath been obſerved) for the Benefit of the Parſon, or that he may have his Offerings, but becauſe he having charged himſelf with the Cure of their Souls, he may be enabled to take Care of that Charge. But at another Day, Holt Ch. Juſt. held, that if a Man repaired to any other Chapel, it would be a good excuſe for his not coming to his Pariſh Church, but then he muſt plead it; he likewiſe held, that if Britton, the Plaintiff in this Prohibition, was a profeſſed Churchman, and his Conſcience would permit him ſometimes to go to the Meetings of Diſſenters, that the Act of Toleration would not excuſe him for not coming to Church, for that Act was not made to give Eaſe to ſuch People; ſo a Rule was made for a Prohibition, and that the Plaintiff ſhould declare on it, that the Matter might come judicially before the Court.

2 Roll. Rep. 455. Hard. 406, 407, 503.

Harman *verſus* Renew. Trin. 7 Will. III. B. R.

(13.) IN this Caſe, which ſee in 1 Salk. it was held, That at Common Law two Churches might be united by the Concurrence of the Patron, Parſon and Ordinary; it was farther held, that tho' in ſuch Caſe there is but one Parſon to both Churches, yet the two Churches remain, and the two Patronages, and the two Pariſhes. But where they are united by Act of Parliament, as in the Principal Caſe, the Pariſh of St. Mary Bothaw was per Statute 22 Car. 2. united to the Pariſh of St. Swithin, and the Queſtion ariſing, whether after ſuch Union the Pariſhioners of St. Mary Bothaw ſhould contribute towards the Repair of the Pariſh Church of St. Swithin, it was adjudged, that they ſhould; becauſe where two Pariſhes are united by Act of Parliament, one of thoſe two Pariſhes is extinct, and both Patrons preſent but as to one Church, tho' 'tis alternis vicibus.

1 Salk. 164. Of the uniting two Pariſhes.

22 Car. 2. cap. 11.

King *verſus* Rice.

5 Mod. 325. Churchwardens, how choſen in *London*, or elſewhere.

(14.) IN London both the Church-wardens are choſen by the Pariſhioners; in other Places the Parſon appoints one, and the Pariſh the other: Per conſuetudinam Angliæ, they are ſworn and admitted by the Archdeacon, and tho' they are unfit, he cannot refuſe them.

CITATION.

The Biſhop of St. David's *Caſe.* Hill. 10 Will. III. B. R.

5 Mod. 433. Archbiſhop hath a Provincial Power over all the Biſhops of his Province.

(1.) THE Biſhop of St. Davids was ſued before the Archbiſhop of Canterbury for Simony, and was cited to anſwer at Lambeth, and not at the Arches, and it was to appear there before the Archbiſhop himſelf, and not before his Chancellor or Vicar-General, and for theſe Reaſons he moved for a Prohibition; but the Court denied it, becauſe the Archbiſhop hath a Provincial Power over all the Biſhops of his Province, and may hold his Court where he will, either at the Arches or elſewhere; and he may likewiſe convene the Party before himſelf, and judge himſelf, and ſo may any other Biſhop, for the Power of a Chancellor or Vicar-General, is only a delegated Power in Caſe of the Biſhop.

Machin *verſus* Moulton. Hill. 11 Will. III. B. R.

5 Mod. 450. For ſubſtracting Tithes, the Party ſhall be ſued in the Dioceſe where ſubſtracted.

(2.) MOulton was Parſon of S. in the Dioceſe of York, within which Pariſh Machin had Lands, but lived in Lincoln in another Dioceſe, and now coming to York, Moulton ſued him in the Spiritual Court there, for Subſtraction of Tithes;

and it was inſiſted againſt the Parſon, that this was a Citing him out of his Dioceſe; at firſt the Court held, that the Reſidency of the Party draws the Cauſe to the Dioceſe where he lives, in tranſitory Matters, but not in local; as for Inſtance, an Executor muſt be ſued for a Legacy where the Will was proved, and not where he lives: But afterwards this Caſe was ruled to ſtand upon a ſingle Reaſon, for whatever the Law might be in other Inſtances, yet in the Caſe of * Tithes, the Statute 32 H. 8. expreſly enacts, that the Party ſubſtracting them ſhall appear before the Ordinary of the Dioceſe where they were ſubſtracted, and therefore a Conſultation was granted in this Caſe.

* 2 Lev. 96.

COLOUR. *See* Pleas 6.

COMMITMENT.

Elderton's *Caſe*. Mich. 2 Annæ.

(1.) ELderton was committed by the Board of Green-Cloth, for executing a Fi. Fa. in Whitehall, and upon the Return of an Habeas Corpus it was argued to be lawful, and not at all prejudicial to the Privilege of the Palace, and that they had no Power to commit for Breach of the Peace, having a Power only over the Queen's Family, for the Government of the menial Servants, and that the Privilege of Whitehall was by the Statute * 28 H. 8.

Northy Attorney-General on the other Side argued, that there is a ſtanding Commiſſion of the Peace for the Verge and Palace,

Mod. Caſes 13. The Queen's Palace hath no Privilege where ſhe is totally abſent. *Poſtea* Privilege 11. S. C.

* 28 H. 8. cap. 12.

and that the Officers of the Green-Cloth are always Commissioners; and that the Statute 28 H. 8. did not create the Privileges of a Palace, but only ascertain'd the Boundaries thereof, for the Queen may declare any House to be her Palace without the Parliament; and such Declaration being made under the Great Seal, it afterwards continues a Palace, tho' the Queen doth not reside there.

Powell Just. The Privilege of the Palace is by Common Law, and that in respect of the King's Presence: Breaking the Exchequer hath been held to be Burglary, tho' none of the King's Money was there; and one Jones had his Hand cut off for a Murder committed by him in the Tower, and was afterwards executed.

Holt Ch. Just. doubted the Case of Burglary in breaking the Exchequer, &c. and denied Jones's Case, because the same Fact cannot be a Misprision and a Murder, for the one will extinguish the other; he said, that it was true, his Hand was cut off, but it was without any Manner of Authority, for he had seen the * Roll, and there was no Judgment for it; he was of Opinion, that where the Queen was totally absent, and neither present by her self or by any of her Domesticks or Family, the Place hath no Privilege; but 'tis otherwise where it was only a personal Absence for a little Time: The Queen at this Time was at Windsor; now whilst she was there, suppose a Murder had been committed in Whitehall, shall the Fact be tried before the Lord Steward; and he held that it should not.

* Mich. 15 & 16 Eliz. Rot. 2. Burdett v. Muskett.

Clerke's *Case*.

(2.) THE Return of an Habeas Corpus was, that there was a Custom in London, that if a Man chosen of the Livery of any Company should refuse to take upon him the Office, that the Mayor and Aldermen might commit such Person * until he should declare, that he would take upon him the Office, and that Clerke was chosen a Livery-man of the Company of Vintners, and refused to hold the Office, and thereupon he was committed by a Warrant in Writing, &c. until he should declare, &c. it was objected, that this Return was ill, because it did not set forth to whom he should declare his Consent; besides, it was an insignificant Custom, to commit until he should declare, because after such Declaration he might still refuse to hold the Office; they might impose a Fine to be levied by Distress, but they cannot commit; 'tis true, a Custom to commit until he should take upon him the Office of an Alderman, is good, because 'tis an Office for Administration of Justice, but a Livery-man is not such an Office: Another Objection against the Return was, that

5 Mod. 64, 156. Custom returned for the Mayor, &c. to commit to the Sheriff, and it did not appear that the Person to whom he was committed was Sheriff.

* 1 Vent. 115.

the Warrant of Committment should have been returned in hæc verba: But per Curiam, this Commitment being by a Court of Record, the Warrant need not be returned in hæc verba, as it ought if it had been extrajudicial Commitment: But the chief Objection was, that here was a Custom returned for the Mayor and Aldermen to commit to the Sheriffs of London, &c. or any other Officer; and the Return was, that he was committed Custodiæ meæ, without saying, he was Sheriff of London, or any other Office attending the Court; and for this Reason it was adjudged insufficient.

The King versus Wright.

(3.) THE Justices of Peace committed T. S. for a forcible Entry, and G. H. was indicted for suffering him to Escape; upon Not guilty pleaded, the Defendant was found guilty, and afterwards he brought a Writ of Error, for that it did not set forth how this Commitment was made, (viz.) whether upon View of the Force by the Justices, or upon an Indictment found; neither is it set forth, that debito modo commissus fuit: Sed per Curiam, 'tis only an Inducement to the Offence laid in the Indictment; besides, after a Verdict it shall be intended, that the Commitment was legal. 1 Vent. 169. Indictment for suffering a Man committed for a forcible Entry to Escape.

COMMON.

(1.) HE who hath Common appendant or appurtenant, can keep but a Number of Cattle proportionable to his Land, for he can Common with no more than the Land to which his Common belongeth is able to maintain. Jones 282, 286.

(2.) One cannot prescribe to have sole Common of Pasture, excluding the Lord, but a Man may prescribe to have solam pasturam omni Anno omni tempore Anni, for this is not Common but Pasture, and the Lord is not excluded from the whole Profits, for he has the Trees & Mines. 2 Lev. 2.

(3.) And such a Prescription is good, without alledging Levancy and Couchancy, but 'tis otherwise in Case of Comwon, for that

that ought to be of ſuch Cattle as are levant and couchant upon his Tenement, becauſe the Levancy, &c. is the Meaſure of the Profit in the Common.

(4.) One who hath ſolam paſturam, may licence another to put in his Cattle.

(5.) And ſo may one who hath Common in groſs for a certain Number, becauſe ſuch a Common is neither appendant, nor a Common in groſs ſans nombre.

(6.) So where a Man hath ſolam paſturam, he may licence another pro hac vice, to depaſture his Cattle, but not for any Time certain, ſo that would amount to a Leaſe of a Thing (which lies in grant) and without Deed.

2 Lev. 73. (7.) A Common appurtenant to a Meſſuage and Lands may be aliened, if 'tis for a certain Number of Beaſts, otherwiſe where 'tis a Common appurtenant for all Beaſts levant and couchant on the Land.

2 Lutw. 1240. (8.) One Commoner cannot diſtrain the Beaſts of another Commoner depaſturing in the Common, but he may the Beaſts of a Stranger, becauſe he had no Pretence of any Right.

Woolſton *verſus* Slater.

3 Lev. 104. Commoner cannot diſtrain the Beaſt of a Stranger, without ſhewing how he is damnified in his Common.

(9.) IN Replevin, the Defendant avowed for Damage-feaſant on his Common; and upon a Demurrer to this Avowry it was adjudg'd not good, becauſe he did not ſhew ſome particular Damage to himſelf, or that he could not have his Common in tam Amplo modo quo debuit & conſuevit; for a Commoner cannot juſtify to diſtrain the Beaſt of a Stranger, without ſhewing how he is damnified in his Common.

CONDITION.

(1.) THE Condition of a Bond is always to be taken and construed in Favour of the Obligor, because 'tis the Words and Concession of the Obligee; and wherever any Sense can be collected out of the Words, it shall never be construed to be insensible, because 'tis to save a Forfeiture. Jones 182. Saund. 66.

(2.) Where a Man is bound in a Bond with a Condition, not to Trade, both Bond and Condition are void; but if he was bound not to Trade in a particular Place, 'tis good.

(3.) These Diversities were taken by Holt, Ch. Just. ff. Where in Executory Contracts the Agreement is, that one shall do such an Act, and for the doing thereof the other shall pay so much Money, there the doing the Act is a Condition precedent to the Payment of the Money, and the Party shall not be compelled to pay till the Act is done. Condition precedent. 1 Vent 177, 214.

(4) Where a Day is appointed for the Payment of Money, which Day happens before the Thing contracted for can be performed, there an Action may be brought for the Money before the Thing is done, because here it appears, that the Party relied upon this Remedy, and never intended to make the Performance of the Thing a Condition precedent. 1 Vent. 147. 1 Saund. 319.

(5.) Where a certain Day of Payment is appointed, which is to enure at a Time subsequent to the Performance of the Act, which by the Contract the Party had agreed to do, there Performance must be averred, and so is Jones 218 to be understood; and some other Books contrary to this are not Law, for every Man's Bargain ought to be performed as he intended it; and where a Man relies upon his Remedy, 'tis but just that he should stand to his Agreement, so, on the contrary, there is no Reason he should be compelled to trust when he did not intend it. Dyer 76. contra.

(6.) And therefore where two agree, that one shall have his Horse, and the other shall pay so much Money; no Action lies for the Money till the Horse is delivered.

Page *verſus* Heyward. Trin. 3 Annæ.

Where he who is to perform a Condition may be diſabled, where not.

(7.) ADjudged, that where he who is to perform a Condition is only in Nature of a Truſtee or Inſtrument, there a temporary Diſability is abſolute and for ever; but where the Performance is for his own Advantage, 'tis otherwiſe, for the Diſability may be removed, and then he may perform the Condition.

CONSIDERATION.

Hutt. 77.

(1.) THE Defendant promiſed, that in Conſideration the Plaintiff would pay the Money due to him on Bond on ſuch a Day, that he would deliver up the Bond; adjudged a good Conſideration, becauſe now he might have the Money without putting the Bond in Suit.

Sid. 89.

(2.) A Surety having paid the Debt of his Principal, who was dead, told his Executor, that he had paid the Money, who thereupon promiſed to repay him, if he would forbear till ſuch a Day; adjudged a good Conſideration, for the Executor was liable in Equity, tho' not at Law without a Promiſe.

(3.) A Promiſe upon a Conſideration executed or paſt, unleſs 'tis grounded upon a precedent Requeſt, is not good, but where it was made upon Requeſt, the ſubſequent Promiſe relating to it ſhall prevail; as for Inſtance, if a Promiſe is made at the Time of the Requeſt, for there the Conſideration is meritorious: Thus a Promiſe to pay 10 l. for that W. R. was Bail for my Servant, is not good; but a Promiſe to pay 10 l. for that he was Bail at my Requeſt for him, is good.

(4.) A Promiſe grounded on a Conſideration excutory, or which continues, is good, tho' the Conſideration was without Requeſt; as for Inſtance, for that you married my Daughter, I promiſe to give you 100 l. good, or for that I owe you 20 l. lent to me, I promiſe to pay you on ſuch a Day, this is good, for the Debt continuing, the Conſideration muſt continue.

(5.) But where the Plaintiff declared, that in Consideration he would discharge the Defendant from 22 l. due from him to W. R. his Master, he (the Defendant) promised to lay out 40 l. in repairing the Plaintiff's Barge; this was held void, and the Consideration illegal, for the Plaintiff cannot discharge a Debt due to his Master.

Thornburgh *versus* Whitacre.

(6.) Assumpsit in Consideration of half a Crown by him given to the Defendant, he promised to give him (the Plaintiff) two Grains of Rye on Monday following, and so on every Monday double, by Progression, for one Year: The Defendant pleaded Non Assumpsit, and upon a Motion to stay the Trial, it was denied; for per Curiam, tho' it amounts to a great Quantity, yet the Jury will consider the Folly of the Defendant, and give reasonable Damages.

Mod. Cases 305. 1 Lev. 111. S. P. Consideration tho' not good, yet the Jury may give reasonable Damages.

CONSPIRACY.

(1.) When Conspiracy is the Gist of the Action, if one be acquitted, the other cannot be found guilty, but where the Gist of the Action is upon another Matter, and the Conspiracy is only laid by Way of Aggravation, if one be acquitted, the other may be found guilty; but in both Cases, if one be found guilty, and the other dies or doth not come in, Judgment may be given against him who was found guilty.

1 Vent. *Thodie's* Case.

(2.) Where a Man is falsly and malitiously indicted of any Crime, which may prejudice his Fame or Reputation, he may have an Action for the Conspiracy.

(3.) And so he may, tho' the Offence for which he was indicted doth not import Slander, but indanger his Liberty (i. e.) where 'tis such for which he may be imprisoned.

(4.) And so he may, if the Indictment is only injurious to his Property, in putting him to a needless Expence in defending himself.

Page *versus* Heyward. Trin. 3 Annæ.

Where he who is to perform a Condition may be disabled, where not.

(7.) ADjudged, that where he who is to perform a Condition is only in Nature of a Truſtee or Inſtrument, there a temporary Diſability is abſolute and for ever; but where the Performance is for his own Advantage, 'tis otherwiſe, for the Diſability may be removed, and then he may perform the Condition.

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Sid. 89.

(2.) A Surety having paid the Debt of his Principal, who was dead, told his Executor, that he had paid the Money, who thereupon promiſed to repay him, if he would forbear till ſuch a Day; adjudged a good Conſideration, for the Executor was liable in Equity, tho' not at Law without a Promiſe.

(3.) A Promiſe upon a Conſideration executed or paſt, unleſs 'tis grounded upon a precedent Requeſt, is not good, but where it was made upon Requeſt, the ſubſequent Promiſe relating to it ſhall prevail; as for Inſtance, if a Promiſe is made at the Time of the Requeſt, for there the Conſideration is meritorious: Thus a Promiſe to pay 10 l. for that W. R. was Bail for my Servant, is not good; but a Promiſe to pay 10 l. for that he was Bail at my Requeſt for him, is good.

(4.) A Promiſe grounded on a Conſideration excutory, or which continues, is good, tho' the Conſideration was without Requeſt; as for Inſtance, for that you married my Daughter, I promiſe to give you 100 l. good, or for that I owe you 20 l. lent to me, I promiſe to pay you on ſuch a Day, this is good, for the Debt continuing, the Conſideration muſt continue.

(5.) But where the Plaintiff declared, that in Consideration he would discharge the Defendant from 22 l. due from him to W. R. his Master, he (the Defendant) promised to lay out 40 l. in repairing the Plaintiff's Barge; this was held void, and the Consideration illegal, for the Plaintiff cannot discharge a Debt due to his Master.

Thornburgh *versus* Whitacre.

(6.) Assumpsit in Consideration of half a Crown by him given to the Defendant, he promised to give him (the Plaintiff) two Grains of Rye on Monday following, and so on every Monday double, by Progression, for one Year: The Defendant pleaded Non Assumpsit, and upon a Motion to stay the Trial, it was denied; for per Curiam, tho' it amounts to a great Quantity, yet the Jury will consider the Folly of the Defendant, and give reasonable Damages.

Mod. Cases 305. 1 Lev. 111. S. P. Consideration tho' not good, yet the Jury may give reasonable Damages.

CONSPIRACY.

(1.) WHEN Conspiracy is the Gist of the Action, if one be acquitted, the other cannot be found guilty, but where the Gist of the Action is upon another Matter, and the Conspiracy is only laid by Way of Aggravation, if one be acquitted, the other may be found guilty; but in both Cases, if one be found guilty, and the other dies or doth not come in, Judgment may be given against him who was found guilty.

1 Vent. *Thodie's* Case.

(2.) Where a Man is falsly and malitiously indicted of any Crime, which may prejudice his Fame or Reputation, he may have an Action for the Conspiracy.

(3.) And so he may, tho' the Offence for which he was indicted doth not import Slander, but indanger his Liberty (i. e.) where 'tis such for which he may be imprisoned.

(4.) And so he may, if the Indictment is only injurious to his Property, in putting him to a needless Expence in defending himself.

F. N. B. 116.

(5.) And in these Actions 'tis not the Conspiracy but the Damages, which are the Ground of them; and therefore per Holt Ch. Just. one may be acquitted and the other found guilty, which cannot be in a Writ of Conspiracy.

(6) Where there is a malitious Indictment in Prejudice of the Fame and Reputation of another, tho' the Indictment is erronious, or an Ignoramus is found, yet an Action will lie, for the Mischief arises by the Slander; but 'tis otherwise where the Indictment is for a Trespass, or for a Riot, because in such Cases the Defendant is indicted in Respect of an Injury to his Purse, which cannot be where 'tis erronious, or an Ignoramus found.

(7.) Action on the Case for causing and malitiously procuring him to be indicted for a Riot, by Reason whereof he was put to great Charge in defending it, good, for he was damnified in his Property, and that out of Malice; but in such Case the Plaintiff must prove expres Malice in the Defendant, and not only that he (the Plaintiff) was innocent.

Nota, most of these Points were adjudged in the Case of Savill and Roberts. Quod Vid.

CONSTABLE.

Charly *Parish's Case.* 9 Will. III. B. R.

Where a Constable may execute a Warrant out of his Parish, where not.

(1.) THE Village of Charley having no Constable, the Justices by Order of Sessions appointed one; but per Holt Ch. Just. where there is no Leet the Constable ought to be chosen in the Town, out of which the Leet was derived; 'tis true, the Justices have exercised this Power, and rather than to deprive them of it, this Court will intend, they have sufficient Authority by some Act of Parliament, and therefore if a Town be erected they may nominate and appoint a Constable; but Charley having no Constable, 'tis no Vill but a Hamlett, for a Vill and a Constable

are reciprocal: And as to the Authority of a Conſtable out of his Pariſh, he held, that if a Warrant is directed to a Conſtable by Name, he may execute it at any Place in the County, tho' he is not compellable to do it out of his Pariſh: But if 'tis directed to all Conſtables generally, in ſuch Caſe 'tis to be taken reſpectively, and no Conſtable can execute it out of his Pariſh.

(2.) When the County was firſt divided into Hundreds, a Conſtable, or conſervator pacis, was appointed in every Hundred, and this was in Aid of the Sheriff, who was the general Conſervator Pacis thro' the whole County; and ſo alſo in Aſſiſtance of the Conſtables who had the whole Hundred, Petty Conſtables came at laſt to be appointed in every Town.

(3.) At firſt both the Conſtable and Petty Conſtable were appointed by the Sheriff in his Tourn, and there they were ſworn, but now they are commonly appointed at the Court-Leet, and in Default thereof by the Seſſions.

(4.) And as to his Authority out of his Pariſh: Per Holt Ch. Juſt. If a Warrant is directed to ſuch a Conſtable by his Name, he may execute it in any Place in the County, tho' he is not compellable ſo to do, or to do it out of his Pariſh; but if the Warrant is directed to all Conſtables in general, then 'tis to be taken reſpectively, and in ſuch Caſe a Conſtable cannot execute it out of his Pariſh.

COPYHOLD.

Fiſher *verſus* Nicholls. Hill. 12 Will. III. B. R.

(1.) IN this Caſe Holt Ch. Juſt. held, that Copyhold Eſtates are ſubject to the Rules of Law, and will not paſs by ſuch Words in a Conveyance as are improper to paſs other Eſtates, unleſs there is a Cuſtom for that Purpoſe, for that may and often doth diſtinguiſh them; thus by Cuſtom in ſome Ma-

Poſtea Deviſe 10. Copyhold Eſtates are ſubject to the Rules of Law.

hors a Grant to A. B. and C. shall be construed as a Gift to A. for Life, Remainder to B. for Life, Remainder to C. for Life.

Page *versus* Smith. Mich. 8 Will. III.

What is Copyhold, and what not.

(2.) IN this Case, per Holt Ch. Just. whatever may pass by Deed without Surrender, tho' it may be necessary to enroll the Deed, is no Copyhold; likewise whatsoever may pass by Surrender * secundum consuetudinem Manerii, without saying, ad voluntatem Domini, is no Copyhold.

* 2 Lutw. 1171.

1 Lev. 26. (3.) Adjudged, that where a Copyhold is forfeited, the Lord may grant it without a Seisure, for the Forfeiture is a Determination of the Will of the Party, and the Lord is in as of his Reversion.

(4.) A. Dominus pro tempore habens titulum, dispenses with the Forfeiture by admitting a Copyholder who hath forfeited, and that not only as to himself but also to him in Reversion, for his Grant and Admittance amounts to an Entry for the Forfeiture and new Grant.

(5.) But an Admittance by a Lord who hath no Title, but is a Disseisor, cannot purge the Forfeiture. Ibid.

Hard. 293. (6.) A Covenant to surrender Copyhold-Lands to W. R. the Covenantor surrendered to two Copyholders out of Court, to the Use of W. R. adjudged this is a good Performance of the Covenant, for this is a good Surrender.

CORONER.

1 Lev. 120. (1.) HE is chosen by the County, and therefore his Office doth not determine by the Demise of the King.

Poph. 209. 2 Lev. 141. (2.) He cannot take an Inquisition but upon View of the Body, therefore where one drowns himself, and the Body cannot be found, the Inquisition must be taken by Commission or by Justices of Peace, or Justics of Assise may make Inquisition without

a Commiſſion, and ſuch Inquiſitions are traverſable, tho' an Inquiſition taken before a Coroner is not as it hath been ſometimes held; but antiently it was traverſable in all Caſes, but where it was fugam fecit, and ſo 'tis now. 2 Lev. 141. 152.

(3.) Therefore where a Coroner's Inqueſt found W. R. felo de ſe, his Executors were admitted to traverſe it, but the Inqueſt was quaſhed for the Omiſſion of the Word Murdravit. 2 Lev. 152.

(4.) A Coroner's Inqueſt ſuper viſum Corporis, found that W. R. felonice ſeipſum in Rivum miſit & in Rivo prædicto ſeipſum emergit, & ſic ſeipſum murdravit, this was quaſhed, for emergo is to riſe out, and not to ſink down in the Water, and the Going into the River is not Felony nor felonious, but 'tis the Drowning that makes it Felony; therefore the Concluſion, & ſic ſeipſum murdravit without the Premiſſes, is naught; for 'tis not ſufficient to find a Man murder'd himſelf, without ſhewing how.

(5.) A Coroner's Inqueſt may be ſet aſide for a Misbehaviour of him in his Office, and a Melius inquirendum by B. R. as ſupreme Coroner, or B. R. may iſſue out a Commiſſion, or Juſtices of Oyer and Terminer may inquire, but there cannot be a Melius inquirendum to the Coroner. 1 Vent.

(6.) Upon an Indictment and Trial for a Murder, Depoſitions taken before the Coroner may be given in Evidence, if the Witneſſes are dead. 1 Lev. 180.

(7.) He muſt write down the Effect of the Evidence given, and certify it to the Juſtices of Gaol-Delivery, and bind over the Witneſſes to appear. 3 H. 7. cap. 1. 1 & 2 Ph. & M. cap. 13.

CORPORATION.

Anonymus.

What is a Corporation.

(1.) PER Holt Ch. Juſt. A Corporation is an Ens civile, a Corpus politicum, a Perſona politica, a Collegium, an Univerſitas, a jus habendi & agendi; ſome are conſtituted for publick and others for private Charities; the former are not ſubject to any Founder, or particular Statutes, but to the general Laws and Statutes of the Realm, by which they are maintained and ſupported; but private Charities are ſubject to the Rules and Ordinances of the Founder, who by Law is Viſitor, unleſs he appoint another.

Anonymus. Mich. 10 Will. III. C. B.

Corporation by Preſcription may have ſeveral Names, but if by Charter it can have but one Name. *See* Hardres 405.

(2.) A Corporation, per Treby Ch. Juſt. and Powell Juſt. if by Preſcription, may have ſeveral Names; but if by Charter, 'tis otherwiſe, for in ſuch Caſe it cannot have ſeveral Names at the ſame Time and to the ſame Purpſe; for if a new Charter is granted, and by a new Name, the old one is gone; as in the Caſe of Baptiſm by one Name, and Confirmation by another, but ſuch Corporation may have ſeveral Names to ſeveral Purpoſes; for it may be created per nomen D. to take and to grant, and per nomen F. to ſue and be ſued.

College of Phiſitians verſus Salmon. Trin. 13 Will. III. B. R.

5 Mod. 327. 2 Salk. 451. Corporation muſt have a Name, either expreſs or implied in the Patent.

(3.) IN this Caſe it was held by Holt Ch. Juſt. that where my Lord Coke ſays, a Corporation muſt have a Name, it muſt be underſtood, either as expreſſed in the Patent, or implied in the Nature of the Thing; as if the King ſhould incorporate the Inhabitants of Dale, and give them Power to chooſe a Mayor; in this Caſe, tho' there is no Name of Incorporation in the Patent, yet it would be a good Incorporation, and the Name

would be Mayor and Commonalty; so the City of Norwich was incorporated by a Grant of H. 4. by the Name of Mayor and Sheriffs, and they are called, Mayor, Sheriffs and Commonalty.

The Mayor of Thetford's *Case.* Hill. 1 Annæ.

(4.) A Mandamus being returned without the Common Seal, and without the Hand of the Mayor; and it being moved, that tho' it was returned in the Name of the Corporation, yet it was no corporate Act to charge the Corporation, without their Common Seal, nor the Mayor without his Hand, and therefore one or both ought to be done; whereupon the Court ordered Precedents to be searched, and it appeared that there were many without the Common Seal, and without the Mayor subscribing his Name; and it was held by Holt Ch. Just. to whom the Court agreed, that a Corporation may do an Act on Record without their Common Seal; that this is the Case of the City of London every Year, who make an Attorney yearly in this Court by Warrant of Attorney, without Sealing or Signing it, and the Reason is, because they are estopped by the Record to say, that it is not their Act; and therefore, if an Action should be brought against the Corporation for a False Return, they are estopped to say, that 'tis not their Return, for 'tis Responsio Majoris, &c. upon Record; and as to the Hand of the Mayor, 'tis a sufficient Evidence to charge him, that the Mandamus was delivered to him, and that it hath his Return, and 'tis incumbent upon him to shew the contrary; for the Mayor or any other Magistrate of the Corporation, who caused or procured the Return, are chargeable in their Private Capacities, if 'tis false.

1 Salk. 192. Where a Corporation may do an Act on Record, without their Common Seal.

Newton *versus* Travers. Mich. 8 Will. III.

(5.) Adjudged, that a Dean and Chapter, or a Warden and Fellows of a College, may Grant or Lease by the Name of Dean and Chapter, &c. and without shewing their proper Names; and so they may plead or be impleaded, because in their corporate Capacity they have no Name of Baptism, or any other Name than that by which they are incorporated; but 'tis otherwise in the Case of a Parson and Vicar, for they must Use their Name of Baptism.

How a Dean and Chapter may Lease. 1 Leon. 307. 1 Inst. 3. *a. contra.*

Anony-

Anonymus. Paſch. 13 Will. III.

Corporation not appearing to an Action.

(6.) AN Action was brought againſt the Eaſt-India Company, who are a Corporation, and the Action was for 5000 l. and ſeveral Diſtringas's ſerved, but they did not appear; whereupon the Court was moved, that they might have exemplary Iſſues returned, and a Rule was made, that the Sheriff ſhould return good Iſſues, otherwiſe to bring an Action againſt him for not doing it; but at laſt he was ordered to attend.

Corporation not appearing, there cannot be a Seiſure without a Summons.

(7.) An Information was exhibited againſt the Bailiffs and Burgeſſes of Yarmouth, one of the Bailiffs (there being two) appointed an Attorney to appear, but the other would not conſent, and the Court was moved, that their Liberties might be ſeiſed for Want of an Appearance: But the better Opinion was, that upon an Information in Nature of a Quo Warranto, which is datum eſt Curiæ intelligi, and which is in Nature of a perſonal Action, there cannot be a Seiſure before a Summons (i. e.) the Liberties cannot be ſeiſed upon a Venire facias, but upon a Diſtringas; but 'tis otherwiſe in a Quo Warranto, for there 'tis Summonitus fuit; then it was made a Queſtion, whether a Warrant of Attorney made by one of the Bailiffs, was not ſufficient, becauſe the Corporation did not diſavow it, but that was not determined.

COSTS.

The King verſus Summers. Paſch. 1 Annæ.

Coſts taxed after the *Certiorari*, without conſidering the Coſts below.

(1.) THE Defendant was indicted for a Treſpaſs, and alſo for a Riot; and upon Not guilty pleaded, it was removed into B. R. by Certiorari, and the Defendant went before the Maſter, who tared Coſts; and the Court was moved, that he might go before the Maſter again, that the Proſecutor might

be considered in the Costs for his Charges below, the Master having only taxed Costs in Respect to the Charges since the Certiorari; and per Curiam, The Master ought not to consider the Charges below, but only upon the Certiorari; then it was moved to aggrevate the Fine, but that was denied, since the Party had been before the Master, and if he insisted on it, the Court would set aside the Costs already taxed.

Bigland *versus* Robinson. Hill. 8 Will. III. B. R.

(2.) ADjudged, that where Executors sue upon any Contract of their Testator, or for any Wrong done to him, they shall pay no Costs either upon a Nonsuit or Verdict against them; so wherever he must sue as Executor, as for Instance, he brought an Action of Debt upon a Bond due to his Testator, the Defendent pleaded Payment of the Money to himself (viz.) to the Executor, upon which they were at Issue, and a Verdict against the Plaintiff, yet he paid no Costs; but if he had brought the Money into Court, then the Plaintiff must proceed at his Peril. Executors pay no no Costs.

Jenkins & Ux' *versus* Plombe. Hill. 2 Annæ B. R.

(3.) DEBT by Husband and Wife, as Executors of W. R. in which they declared, that the Defendant was indebted to them as Executors for so much Money, received by the Defendant for them as Executors; upon Non Assumpsit pleaded, the Cause came to be tried, and the Plaintiffs were Nonsuited; and in this Case several Points were resolved by Holt Ch. Just. to which the Court agreed. Mod. Cases 91, 181. 1 Salk. 206. Where Husband and Wife must join in the Action.

(1.) Where a Man marries a Woman, who is an Executrix, and if before the Marriage a Stranger receives Money due to the Testator, and he is sued for it, the Husband and Wife must join in the Action; but where the Money is received after the Marriage, the Husband may sue alone.

(2.) If the Money was received after the Marriage, and by Order or Consent of the Husband, 'tis the same Thing as if the Husband had received it himself, it became Assets in his Hands, and the original Debtor of the Testator is discharged; and if 'tis paid by his Order or Appointment, to a third Person, 'tis a Devastavit in the Executors, because the original Debt to the Testator is paid off, and here is a new Debtor to the Executor, who owed nothing to the Testator.

Anonymus. Pasch. 13 Will. III.

Corporation not appearing to an Action.

(6.) An Action was brought against the East-India Company, who are a Corporation, and the Action was for 5000 l. and several Distringas's served, but they did not appear; whereupon the Court was moved, that they might have exemplary Issues returned, and a Rule was made, that the Sheriff should return good Issues, otherwise to bring an Action against him for not doing it; but at last he was ordered to attend.

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(7.) An Information was exhibited against the Bailiffs and Burgesses of Yarmouth, one of the Bailiffs (there being two) appointed an Attorney to appear, but the other would not consent, and the Court was moved, that their Liberties might be seised for Want of an Appearance: But the better Opinion was, that upon an Information in Nature of a Quo Warranto, which is datum est Curiæ intelligi, and which is in Nature of a personal Action, there cannot be a Seisure before a Summons (i. e.) the Liberties cannot be seised upon a Venire facias, but upon a Distringas; but 'tis otherwise in a Quo Warranto, for there 'tis Summonitus fuit; then it was made a Question, whether a Warrant of Attorney made by one of the Bailiffs, was not sufficient, because the Corporation did not disavow it, but that was not determined.

COSTS.

The King versus Summers. Pasch. 1 Annæ.

Costs taxed after the *Certiorari*, without considering the Costs below.

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be considered in the Costs for his Charges below, the Master having only taxed Costs in Respect to the Charges since the Certiorari; and per Curiam, The Master ought not to consider the Charges below, but only upon the Certiorari; then it was moved to aggrevate the Fine, but that was denied, since the Party had been before the Master, and if he insisted on it, the Court would set aside the Costs already taxed.

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(1.) Where a Man marries a Woman, who is an Executrix, and if before the Marriage a Stranger receives Money due to the Testator, and he is sued for it, the Husband and Wife must join in the Action; but where the Money is received after the Marriage, the Husband may sue alone.

(2.) If the Money was received after the Marriage, and by Order or Consent of the Husband, 'tis the same Thing as if the Husband had received it himself, it became Assets in his Hands, and the original Debtor of the Testator is discharged; and if 'tis paid by his Order or Appointment, to a third Person, 'tis a Devastavit in the Executors, because the original Debt to the Testator is paid off, and here is a new Debtor to the Executor, who owed nothing to the Testator.

(3.) In the principal Case, if the Defendant had received this Money, without the Order or Consent of the Husband, in such Case he, by bringing this Action, had affirmed the Receipt, and that it was his Election, and that he consented to make the Defendant his Debtor, so that the original Debtor to the Testator was thereby discharged.

(4.) That tho' the very Bringing an Action against the Defendant shews, that the Plaintiffs consented to make him their Debtor, & omnis rati habitio retrotrahitur, &c. so as the Plaintiffs might bring this Action in their own Name, yet the bare Bringing the Action did not make it Assets in their Hands till Judgment was obtained; and therefore if the Plaintiffs fail in their Action (as they did in this Case, being Nonsuit) the Matter is set at Large again, and the Plaintiff may sue the original Debtor of the Testator, if he will.

Where an Executor shall pay Costs, where not.

(5.) That Executors are not excused from paying Costs by the Letter of the Statute, but by a very favourable Construction thereof; as being presumed to have no Knowledge of the Affairs of their Testator, and therefore an Executor shall pay Costs, for not going on to Trial; and where a Cause of Action arises to the Executor himself, for the which he may sue without naming himself Executor, he shall pay Costs; and tho' he names himself Executor, and sues as such, yet if the Case was so, that he might have sued without naming himself Executor, he shall pay Costs; and that in the principal Case, he might have sued without naming himself Executor, because the Action was brought for so much Money received by the Defendant, to his (the Plaintiff's) Use, and by his Order, and therefore shall pay Costs. And per Curiam, An Executor may bring Trover, as Executor, for a Conversion in the Time of his Testator, and shall not pay Costs, but 'tis otherwise, if the Conversion was in his own Time; so where a Judgment is obtained by the Testator, and the Defendant escapes in the Time of the Executor, for which he brings an Action and is Nonsuit, he shall not pay Costs; but 'tis otherwise, if the Judgment and Escape were both in his own Time.

If W. R. is indebted to the Testator, and the Executor Accompts with him, he (the Executor) may bring an Insimul computasset; and this is a new Action, which the Testator himself could not have brought, yet the Plaintiff shall not pay Costs, because the old Debt remains, for 'tis not extinguished by the Accompt, but made certain, so that 'tis not a New Cause of Action; but where an Executor brought Trover and Conversion, and the Defendant came to an Agreement with him, to pay so much for

the Conversion, in such Case the Plaintiff shall pay Costs, because by this new Agreement the original Cause of Action is extinguished.

(6.) The Ch. Just. held, that where a Plaintiff sues as Executor, and could not sue but as such, the Thing for which the Suit is brought is not Assets till Execution sued forth; but where he needs not sue as Executor, 'tis not Assets till Judgment, and then it is, for the original Debtor is then discharged, so that 'tis a Devastavit: This Case is reported in 1 Salk. 207. but not so full and so clear as here, and in the Argument these Cases were cited, Latch. 220. Hutt. 78, 79, 214, 220. 3 Lev. 60, 375. 2 Lev. 185. 1 Vent. 109, 119. Jones 170. Hob. 219, 233, 284. 1 Cro. 29, 36, 175, 229.

Anonymus. Hill. 9 Will. III.

A Motion was made, that a Pauper might pay Costs for not going on to a Trial: Sed per Curiam, he pays no Costs unless upon a Nonsuit, or where the Verdict is found against him, and then he shall pay Costs, or be whipp'd. See Stat. 23 H. 8. cap. 15.

COVENANT.

(1.) IN Covenant, the Plaintiff assigned several Breaches in not repairing, the Defendant pleaded non infregit conventiones, and upon Demurrer to this Plea it was adjudged ill, because not repairing, and non infregit conventiones are two Negatives, upon which Issue cannot be joined, but 'tis good after a Verdict, for the Issue is not immaterial but informal only. 1 Lev. 114, 183. Pitt v. Russel.

(2.) Covenant and declares, that W. R. and his Wife levied a Fine of Lands sur concessit, to the Plaintiff with Warranty: Per Curiam, an Action of Covenant will lie upon this Warranty as well as Voucher or Warrantia Chartæ. 1 Lev. 301.

(3.) Covenant for Non-payment of Rent, and assigned the Breach, that the Lessee did not pay the Rent at any of the Feast- 1 Lev. 78.

Days on which it ought to be paid during the Term; this Declaration was held good, tho' general, for it may be true, that no Rent was paid on any of the said Days.

1 Lev. 155. (4.) The Plaintiff conveyed an Office to the Defendant, provided, that out of the first Profits he pay the Plaintiff 500 l. adjudged, that an Action of Covenant lies on this Proviso, for 'tis not by Way of Condition or Defeasance, but in Nature of a Covenant to pay the Money.

1 Vent. 148. (5.) Covenant to pay W. R. 100 l. he making him an Estate in D. adjudged, that if he tender him a Feoffment, and offer to make Livery and Seisin, &c. he may bring an Action for the Money as if he had actually made a Title.

1 Vent. 185. (6.) Lessee for forty Years made an Under-lease to W. R. for five Years, and afterwards made a Lease to L. L. for forty Years, who covenants to repair durante termino præd. 40 Annorum, the Under-Lessee refused to attorn, yet L. L. the Lessee for forty Years must repair, because his Lease is commenced in Point of Computation.

1 Vent. 126. (7.) Debt upon a Bond of Covenants, and for Breach, assigned, that the Defendant had broke the Covenants; upon a Demurrer to this Declaration it was held to be ill, because 'tis double, for he ought to have insisted upon one Breach certain.

Copley *versus* Hepworth. Trin. 3 Jac. Rot. 261. B. R.

What are mutual Covenants.

(8.) IN an Action of Covenant upon Articles of Agreement, &c. wherein the Plaintiff covenanted with the Defendant facere dimissionem, to him of a Mill, paying 20 l. Rent per Annum for so many Years, and the Defendant covenanted to pay the Rent during the Term; the Plaintiff brought this Action for Non-payment of Rent, in which he set forth, that the Defendant entered and enjoyed the Mill, &c. The Defendant pleaded, that the Plaintiff did not make any Lease to him; and upon Demurrer to this Plea it was adjudged, that these Articles did not amount to a * Lease, being only a Covenant facere dimissionem; and Holt Ch. Just. held, that the Making the Lease was a Matter precedent, and that the Plaintiff could not be entituled to the Rent till a Lease was made, but Eyres, Dolben, and Gregory Justices contra, because these are mutual Covenants, and equal Remedies are on both Sides; and 'tis alledged that the Defendant entered, but upon the other Point the Defendant had Judgment upon arguing the Demurrer Mich. 2 Will. 3.

* Roll. Ab. 848. 2 Cro. 172.

Hannam *verſus* Redman. Mich. 9 Will. III. B. R.

(9.) PER Holt Ch. Juſt. Where ſeveral Lands are charged with a Rent-charge, and the Owner of theſe Lands makes a Leaſe thereof, and covenants with the Leſſee to ſave him harmleſs, &c. and afterwards the Leſſee pays the Rent to the Grantee of the Rent-charge, voluntarily and without Compulſion, in ſuch Caſe he pays it in his own Wrong, and muſt pay it again to the Leſſor; but if he is diſtrained for the Rent-charge and his Goods taken, this is a Breach of the Covenant, and not before; and the Leſſee muſt not alledge generally, that he was compelled to pay the Rent, but muſt ſhew how.

Covenant to ſave the Leſſee harmleſs from a Rent-charge, if he pay it without Compulſion, he pays it in his own Wrong.

(10.) A Biſhop made a Leaſe, in which the Leſſee covenanted to repair, the Biſhop died, and his Executors brought an Action for not repairing in the Time of the Biſhop, and adjudged well. 2 Vent. 56.

COVENANT to ſtand ſeiſed. *See* Uſes.

COUN-

COUNTY PALATINE.

Cotton *verſus* Johnſon. Hill. 2 Will. III. B. R.

1 Salk. 183. In Ejectment for Lands in *Ely*, a *Venire facias* was prayed to the next Vill.

(1.) IN Ejectment for Lands in the Iſle of Ely, after Not guilty pleaded, it was ſuggeſted on the Roll, the Privilege of the County Palatine, that no Jury ſhould be returned out of the Iſle, and ſo a Venire facias was prayed to R. the next Vill in the County of Cambridge, Et quia videtur Juſticiariis hic rationi conſonans ei conceditur; it was objected, that the Defendant's Confeſſion ſhould have been entered likewiſe on the Roll, (viz.) Et quia Defendens hoc non dedicit Ideo ei conceditur, but adjudged, tho' ſome Precedents are ſo, yet either Way is well enough; for if the Fact is otherwiſe, he may bring a Writ of Error, and aſſign it for Error; then it was objected, that the Entry ought to have been, quod liberi tenentes nec reſidentes in eadem inſula non aggredi debent ad aliquam juratam extra libertatem illam faciend'; for otherwiſe it doth not appear to be a Privilege annexed to the Inhabitants, but a meer Cogniſance in the Biſhop; however, the Trial being in the County of Cambridge, of which this is Parcel, the Court held it to be aided by the Statute 16 & 17 Car. 2. cap. 8.

* 1 Vent. 157.

(2.) Tho' 'tis commonly ſaid, that * Lancaſter is a County Palatine by Act of Parliament, and Cheſter and Durham by Preſcription, yet this muſt not be intended of a meer Preſcription, becauſe a Franchiſe, quæ ſe exaltat in Prærogativum Regis, can never be gained by meer Preſcription, but muſt depend on antient Grants of Kings, and Allowances in Eyre as well as by Preſcription.

(3.) 'Tis true, Lancaſter was erected into a County Palatine, in pleno Parliamento, Anno 50 Ed. 3. and it was granted by the King to his Son John for Life, that it ſhould have jura Regalia, and a King-like Power to pardon Treaſons, Outlawries, to make Juſtices of Peace and Juſtices of Aſſiſe, and all Proceſſes and Indictments were in his Name; but theſe Royalties are abridged by the Statute 27 H. 8. cap. 24.

(4.) But because Lancaster was erected by Act of Parliament into a County Palatine, therefore Outlary in Lancaster is pleadable in the Courts of Westminster, but Outlary in Chester is not.

(5.) By the Charter of H. 4. confirmed by Parliament, the Possessions of the Dutchy of Lancaster are kept separate from the Crown, and are to be in the King as they were before he was King, so as to pass by Livery or Grant. Plow. 215. 2 Inst. 205.

(6.) There is a Seal for the County Palatine, and another for the Dutchy, (i. e.) such Lands as lie out of the County Palatine, and yet are Part of the Dutchy; for such there are, and the Dukes of Lancaster held them, but not as Counts Palatine, for they had not Jura Regalia over them. 2 Lutw. 1236.

(7.) 'Tis for this Reason, that the King may make a Corporation by the Seal of the County Palatine, within the County Palatine, for so might the Count Palatine himself, as having Jura Regalia.

(8.) But the King cannot grant or make a Corporation by the Dutchy Seal within the Dutchy Lands, because 'tis Jus Regale to grant a Corporation, and the Duke of Lancaster qua talis could not do it.

(9.) Any thing natural, and which arises from the Land, and which might be granted, the King may grant under the Dutchy Seal, for those Things might be granted by the Duke of Lancaster as he was a Subject; of this Nature are Advowsons, Rents, Wayes, Offices, &c. for these savor of the Land, and might have been granted by the Duke before the Possessions came to the Crown; but 'tis not so of a Fair or Market, for those are Jura Regalia.

(10.) Prohibition was prayed to the Dutchy Court at Westminster, for holding Plea of Lands within the County Palatine, when there is a Court in the Dutchy for that Purpose, and the Dutchy at Westminster is only for Lands out the County Palatine. Et per Curiam, It doth not appear, that they have any legal Authority to act as a Court of Equity, for the Statute of Ed. 4. doth not give them a Court of Equity, but a Court of Revenue; however it was allowed, because of long Continuance and Practice. 2 Lev. 24.

CUSTOM.

(1.) AS no Law can oblige a People without their Consent, so wherever they consent and use a certain Rule or Method as a Law, such Rule, &c. gives it the Power of a Law.

(2.) Now this Consent is either verbis or factis (i. e.) 'tis expressed by Writing or implied by Deeds and Actions; and where a Law is founded on an implied Assent, rebus & factis, 'tis either Common Law or Custom.

(3.) If 'tis Universal, then 'tis Common Law, if Particular to this or that Place, then 'tis Custom, and had its Rise in this Manner;

(4.) ff. When the People found any Act or Rule to be fit and agreeable in its first Instance, it was natural for them to repeat and practice that Rule; and if this continued from Age to Age, and was so practised, then it grew into a Law either local or national, according to the Extent of it.

(5.) And such Customs ought to have four Properties, (1.) It ought to have a reasonable Commencement, for no Usage can make that good, which was not so ab initio.

(6.) But a Custom shall not be taken to be unreasonable because 'tis contrary to the Common Law; for the Customs of Gavelkind and Borough English are contrary to the Common Law, and yet they are allowed to be good.

(7.) Neither is a Custom unreasonable for being injurious to private Persons or Interests, so as it tends to the publick and general Advantage of the People; therefore a Custom to undermine Houses in publico incendio, a Custom to turn his Plough on the Headland of another, are good; the one to prevent the Spreading of the Fire, and the other in Favour of Husbandry.

(8.) But where a Custom is injurious to the Publick, or to a great Number of People, and only for the Benefit of some Individual, in such Cases 'tis unreasonable; as for Instance, a Custom, that the Commoners of such a Manor shall not put in their

their Cattle, till the Lord first put in his Beasts, or that the Lord shall distrain, and keep the Distress taken till a Fine or Ransom is paid at his Pleasure; for the Original of such Customs was by Tort or Usurpation.

(2.) A Custom ought to be certain.

(3.) The Continuance ought to be without Interruption; for Discontinuance destroys a Custom by the same Reason that Continuance made it.

(4.) A Custom must not be against the Prerogative of the King.

(9.) Now as to Local Customs it hath been held, that a Custom of a Manor cannot extend beyond that Manor; therefore in Trespass for breaking his Close in D. the Defendant pleaded a Custom within that Manor, for every Tenant to have a Way in the Place where, &c. and it did not appear, that the locus in quo, &c. was within the Manor, this was held naught upon a Demurrer. Sid. 237.

(10.) Trespass for Breaking his Close; the Defendant pleaded, that the Close lay in the Hundred of W. in the said County, called the Kingsfield, and that in the said Place, called the Kingsfield, there is, &c. Et talis consuetudo usitat' in eodem quod bene alicui (omitting the Word licuit) volenti fodere pro plumbo. Et per Curiam, Want of the Word licuit makes all imperfect; but if it had been in, yet this Plea is naught, because he ought to have laid a Positive Usage in Fact, and not Quod bene licuit alicui, &c. besides the Custom is not laid in any Manor, Vill or Parish, and there cannot be a Custom in a particular Parcel of Ground, called the Kingsfield. 2 Lutw. 1317. Moor 123. 3 Cro. 110, 392. 1 Lev. 262.

(11.) To plead Pro eo quod secundum consuetudinum, a Thing is so and so, is naught; for it ought to positively alledged (viz.) quod infra such a Place, talis habetur consuetudo. 2 Lutw. 1188.

(12.) Custom, that the Parson in Consideration of the greater Encrease of Tithes, shall keep a Bull and a Boar; this is good, because founded on a Consideration of some Benefit. Moor 35. Cro. Eliz. 203.

(13.) But a Custom in London, that if a Stranger die in one Parish and is buried in another, that he shall pay the same Fees to the Parish where he died, that he doth to the Parish where he is buried, is naught, because he was not bound to come to Church, and to receive the Sacrament in that Parish where buried. Roll. Abr. 559.

DAMAGES. *See* Judgments 13.

(1.) WHERE a Judgment is given for the Plaintiff, and the Defendant brings a Writ of Error, and the first Judgment is affirmed, the Defendant in Error shall have Damages and Costs for the Delay of Execution, and the Trouble he is put to, and this by the Statute 3 H. 7. cap. 10. but 'tis otherwise, if the first Judgment was given for the Defendant, and the Plaintiff brings a Writ of Error, for there is no Delay in the Execution; but this is now altered by the Statute 8 & 9 Will. 3. cap. 11. by which it is enacted, that it shall extend only to Judgments upon Verdicts.

1 Cro. 560.
1 Vent. 133.
3 Lev. 374.

(2.) In all Actions where the Plaintiff hath Damages by Common Law, he hath Costs likewise by the Common Law; and so 'tis in all Actions wherein the Plaintiff hath Damages by Vertue of the Statute of Ed. 6. or any precedent Statute, for in all such Actions the Statute gives him Costs as well as Damages.

(3.) And in any of these Cases, if a subsequent Statute doubles or trebles the Damages, the Costs are so too; as for Instance, in Trespass for a Forcible Entry upon the Statute 8 H. 6. or in an Action on the Case upon the Statute 2 H. 4. for suing in the Admiralty for a Matter arising on the Land, or in an Action of Waste, upon the Statute of Glouceſter, against Tenant in Dower, or Tenant by Curtesy, for these are Acts of Additions (i. e.) there were Damages at Common Law in these Cases, which these Statutes encrease.

(4.) But in an Action of Waste against Tenant for Life, or in a Quare Impedit, the Plaintiff shall have Damages, but no Costs, because there were no Damages at Common Law, but are given after the Statute 1 Ed. 6. by subsequent Statutes.

(5.) Now in these Statutes of Creation (i. e.) such Statutes which give Damages, where there were none before at Common Law, or before the first of Ed. 6. there is a Diversity, where a Statute gives certain Damages, and where incertain; for if a Statute of Creation gives incertain Damages, no Costs can be recovered, but if the Damages are certain, Costs shall be recovered

covered as well as Damages; but this is only to be intended of Private Actions to the Party grieved, and not of Popular Actions, as in Tam quam, Informations, &c.

Cook *verſus* Beale.

(6.) ADjudged between theſe Parties in an Action of Aſſault, &c. that where the Plaintiff declares of a Wounding by the Word Maihemavit, 'tis clear the Damages may be encreaſed, tho' Damages are given by the Jury. Where the Damages may be encreaſed, where not.

(7.) So 'tis where the Plaintiff ſets forth a Wound ſo particular in his Declaration, that by the Deſcription it appears to be a Maihem; and ſo 'tis where the Wound is viſible and apparent; and this may be done, whether Damages are given by the Jury upon an Iſſue joined, or upon a Writ of Inquiry.

(8.) But this Encreaſe of Damages muſt be given by the Courts at Weſtminſter upon the View of the Wounding, or upon Affidavits made thereof; and it cannot be done by the Juſtices of Niſi prius, who, if the Wound is very great, muſt endorſe the Evidence on the Poſtea, and upon ſuch Evidence the Damages will be encreaſed, tho' the Wound was not ſet forth in the Word Maihemavit in the Declaration; and ſo 'tis without ſuch Endorſement where the Cauſe was tried before a Judge of that Court where the Motion is made for Encreaſe of Damages. Dyer 105, 228.

(9.) Treſpaſs in the Palace-Court, the Cauſe was removed into B. R. by the Defendant, and the Jury having given 15 s. Damages, the Queſtion was upon the Statute 22 & 23 Car. 2. cap. 9. whether the Plaintiff ſhould have no more Coſts than Damages: Et per Curiam, the Cauſe being removed by the Defendant, the Plaintiff ſhall have more Coſts, but not if it had been removed by the Plaintiff, for ſo he might be more vexatious. 2 Lev. 124.

Death of either Party. See *Scire facias* 2.

Oades *versus* Woodward. Hill. 1 Annæ, B. R.

1 Salk. 87. Where a Judgment was entered after the Party died.

(1.) THE Case was, one Woodward gave a Warrant of Attorney to confess a Judgment, and died in Hillary Vacation, the Attorney entered the Judgment as of Hillary-Term, but did not bring in the Roll till after the Essoin-Day of Easter-Term, so that now it was a post Terminum Roll; and the Question was, whether it should be received, if it was received, then the Judgment would be of Hillary-Term, which was whilst the Party was alive, and consequently it would be good: But per Holt Ch. Just. this Roll was not admitted to be filed; by the Course of the Court, all the Rolls of Hillary-Term ought to be brought in before the Essoin-Day of Easter-Term, and a post Terminum Roll cannot be received without Leave of the Court, upon Motion made for that Purpose; and such Leave is never granted, but where it appears to the Court that no Body can be prejudiced by it, for 'tis dangerous; and tho' it hath been done, he would never consent that it should be done again, because by this Means the Statute of Frauds, and the Statute for docquetting Judgments would be frustrated, for if the Court should allow the Filing this Roll in Easter-Term as a Judgment in Hillary-Term, when it was not amongst the Rolls of that Term, or the Vacation following, how could Purchasers avoid it, when it was neither docquetted, or to be searched after in that Term, upon either of those Statutes; so the Court would not allow the Filing it.

Woolridge *verſus* Cloberrie. Mich. 4 Jac. Rot. 15. B. R.

(2.) AN Action on the Caſe was brought againſt four Defendants, and the Plaintiff had a Verdict and Judgment, (it was for ſtopping his Watercourſe) one of the four Defendants died before the Trial; and afterwards, upon a Writ of Error brought, the * Judgment was held to be erroneous as to him who was dead, and therefore it muſt be reverſed againſt all the Survivors, for it cannot be reverſed in Parcels: The Difference was taken between Actions founded on * Torts and on Contracts, in the firſt Caſe, if there are ſeveral Defendants, and one die before the Verdict, yet the Action ſhall ſtand; ſo if he die after Verdict, the Plaintiff may ſuggeſt the Death of him puis darrein Continuance, and take Judgment againſt the Survivors, but there needs no Surmiſe to alter the Diſtringas or the Venire, for by the Death of one Defendant the Action doth not abſolutely abate: 'Tis otherwiſe in Actions founded upon Contracts, which in their Nature are entire; and therefore in ſuch Caſes, if 'tis ſuggeſted that one is dead, no * Judgment ſhall be entered againſt the Survivors: There is alſo a Difference between Verdicts at Niſi prius and at Bar; for if after a Verdict at the Niſi prius, one of the Defendants die before Judgment, there, if 'tis entered againſt all, 'tis erroneous, but 'tis otherwiſe if entered after a Trial at * Bar, for there the Judgment relates to the Verdict.

Action againſt four Defendants, one died before the Trial, the Judgment againſt the reſt was reverſed.

* Cro. Eliz. 145. Cro. Car. 426, 509, 514. Jones 356, 367, 400.

* Com. 186. Sid. 259.

* Poph. 132. Roll. 768.

Ellwaies *verſus* Lucy.

(3.) THE Plaintiff brought Treſpaſs againſt four Defendants, they all appeared, and after ſome Continuances, three of them pleaded, that the other died after the laſt Continuance, & petunt judicium de Brevi & quod Breve prædict' Caſſetur; and upon Demurrer to this Plea it was adjudged ill, becauſe they ſhould have concluded, Et petunt judicium ſi Curia ulterius procedere vult, for the Writ was actually abated by the Death of the other Defendant.

3 Lev. 120. Treſpaſs againſt four Defendants, 3 pleaded, and the other died, the Action is abated.

DEBT.

DEBT.

Ward *versus* Evans. Mich. 2 Annæ.

Mod. Cases 36. 2 Salk. 442. Taking Paper is no Payment where there was a Debt precedent.

(1.) THE Case. ſ. There was a Debt of 50 l. due to the Maſter, who ſent his Servant with the Debtor to receive the Money; they went to a Goldſmith, upon whom the Debtor had a Bill of 100 l. and the Goldſmith endorſes 50 l. on that Bill, and gave the Servant a Bill upon another Goldſmith for 50 l. and the next Day that Goldſmith broke, and thereupon the Maſter reſorted to the firſt Goldſmith, who refuſing to pay the Money, an Action was brought againſt him by the Maſter, and whether it would lie, or not, was the Queſtion: Et per Holt Ch. Juſt. the Taking a Note in Writing for Goods ſold may amount to a Payment of the Money, becauſe 'tis Part of the original Contract; but Paper is no Payment where there was an original and precedent Debt as in this Caſe there was, for 'tis intended to be taken upon this Condition, (viz.) That the Money be paid in a convenient Time.

Marle *verſus* Flake. Trin. 12 Will. III. B. R.

Payment of Money on a Bond is a good Plea before the Condition broken.

(2.) PER Holt Ch. Juſt. Payment of a Bond with a Condition endorſed is a good Plea before Breach but not after, no more than to an Action of Debt upon a ſingle Bill, for when the Breach is made, the Benefit of the Condition, which is always in Behalf of the Obligor, is gone.

1 Lev. 22.

(3.) Adjudged, that where the Leſſor aſſigned his Rent without the Reverſion, that the Aſſignee (if the Tenant agrees) may maintain an Action of Debt for the Rent, becauſe the Privity of Contract is transferred.

2 Vent. 129.

(4.) The Leſſor made a Leaſe, reſerving 20 l. per Annum to be paid quarterly, Debt may be brought for the laſt Quarter's Rent, without ſhewing the other three Quarters were ſatisfied, for every Quarter's Rent is a diſtinct Debt, and diſtinct Actions lie for each Quarter.

DEEDS.

(1.) THE Elder Saxons made Conveyances of their Lands here, without Deed or Writing (viz.) either by the Delivery of a Turfe, of a new Staff, &c. The firſt Deed concerning Lands was made by Withredus King of Kent, Anno 694. and that, and other ſubſequent Writings made for ſuch Purpoſes, were called Chirographs, but in the Time of the Normans, they were called Charters, and afterwards Deeds. 8 Selm. Rel. 8.

Anonymus. Paſch. 9 Will. III.

(2.) PER Holt, Ch. Juſt. when a Deed is pleaded with a Profert hic in Curia, the very Deed it ſelf is by Intendment of Law immediately in the Poſſeſſion of the Court, and therefore when Oyer is craved, 'tis of the Court, and not of the Party. By a *Profert hic in Curia*, the Deed is in Court.

(3.) After Oyer is craved, the Deed is become Parcel of the Record, and the Court muſt judge upon the whole.

(4.) The Demand of Oyer is a kind of Plea, and may be counterpleaded.

(4.) When a Deed is not in Court no Oyer can be granted; therefore when Oyer is prayed, 'tis always intended, that the Deed is in Court, and the Words ei legitur in hæc verba, &c. are the Act of the Court. Sid. 308.

(6.) In Debt againſt an Adminiſtrator upon a Bond of his Inteſtate, the Defendant demanded Oyer of the Bond and Condition & ei legitur; the Condition was for Performance of Covenants in an Indenture made between the Plaintiff and the Inteſtate; then the Defendant prayed Oyer of the Indenture mentioned in the Condition, tho' it was not in Court & ei legitur, and then he pleaded, and the Plaintiff demurred, ſo that the Indenture was not in Court; it ſhould have been produced by the Defendant, under the Hand and Seal of the Plaintiff, and where it was made, and the Subſtance thereof, that if it ſhould be miſrecited, or a wrong Deed ſet forth, the Plaintiff might plead Non eſt factum: Now in this Caſe he cannot plead that Plea, becauſe the 1 Saund. 8, 9.

the Defendant hath not alledged, that it was the Plaintiff's Deed, and for that Reason he cannot crave Oyer of it, and get it truly entered, if it should be misrecited. But adjudged, that upon a General Demurrer, it shall be intended to be the true Indenture, and that it was in Court, and that if the Defendant had endeavoured to trick the Plaintiff, he might have complained to the Court.

1 Saund. 306. (7.) In Debt upon Bond conditioned for Performance of Covenants in an Indenture: The Defendant craved Oyer of the Condition, and pleads, that he hath the Indenture in Court, and that there are no Covenants therein to be performed, Et hoc, &c. The Plaintiff prayed Oyer of the Indenture, which was entred in hec verba; and it appearing, that there were several Covenants therein to be performed, he demurred to the Defendant's Plea, and adjudged good; for upon Oyer of the Indenture, 'tis made Part of the Defendant's Plea; so that it appearing judicially to the Court, that he did plead a false Plea, and averred against the Truth of what appeared by the Indenture; therefore the Plaintiff needs not shew any Matter of Fact in his Replication to maintain his Action, but 'tis more proper for him to demur.

2 Lev. 113. Cro. Car. 399. Vent. 297. (8.) Adjudged, that where a Chose in Action is created by a Deed, the Destruction of such Deed is the Destruction of the Duty it self; as in Case of a Bond, Bill, &c. but 'tis not so where an Estate or Interest is created by a Deed.

1 Vent. 9, 210. (9.) Debt upon Bond; the Defendant pleads, that he delivered it as an Escrow, Et hoc paratus est verificare; and upon a Demurrer to this Plea, it was adjudged ill, because he ought to shew to whom he delivered it, and then to conclude, Et sic non est factum; for this Plea amounts to a special Non est factum, and the Plaintiff cannot reply, that he delivered it as his Deed, and travers, that he delivered it as an Escrow.

Anonymus. Mich. 3 Annæ.

Date of a Deed either expres or implied. PER Holt Ch. Just. A Date of a Deed is either express or implied; the express Date is the very Day and Year, in which the Deed was made, and this is always intended when in Pleading 'tis said, bearing Date; the other is the Implied Date, which is the Delivery.

DEFAULT.

Staple *verſus* Heydon. Trin. 2 Annæ B. R.

(1.) THIS Caſe is reported in 1 Salk. and in the Modern Caſes, but not in the ſame Manner as followeth; ſi. In Treſpaſs for breaking his Wharf and cutting down his Fences; the Defendant pleaded, that one Grey was poſſeſſed of this Wharf, and a Timber-yard adjoining, for 90 Years, and had and uſed a Way from the Timber-yard over this Wharf to the Thames, and being ſo poſſeſſed, did demiſe the Timber-yard to this Defendant for ſeven Years; and that the Fence being thereon erected to ſtop his Way, he cut it down, and that he had no other Way to the Thames. The Plaintiff replied, that he (the Defendant) had another Way to the Thames; upon which they were at Iſſue, and the Inqueſt was taken at the Niſi prius, by Default of the Defendant; but the Iſſue, whether he had a Way to the Thames, or not, being immaterial, the Court was moved for a Repleader: It was held, that this was an immaterial Iſſue; but it had been otherwiſe, if the Defendant had pleaded, that he had no other Way to the Timber-yard, but that there could be no Repleader, becauſe by this Default the Defendant was out of Court; then it was urged, that the Treſpaſs being not juſtified by the Defendant, it was confeſſed, and therefore Judgment ought to be given againſt him upon his Confeſſion, and not upon the Iſſue and Verdict; ſo is 3 Cro. 214. 1 Leon. 68. But per Holt Ch. Juſt. where the Defendant confeſſeth a Treſpaſs, and avoids it by ſuch Matter as can never be made good by any Manner of Pleading, there Judgment ſhall be given againſt him as upon his own Confeſſion, without any Regard to the Iſſue, and ſo is that Caſe in 3 Cro. But where the Defendant avoids and juſtifies by ſuch Matter as would have been ſufficient, if it had been well pleaded, (which is this very Caſe) this, if ill pleaded, ſhall not be taken for a Confeſſion of the Plaintiff's Action; to which Powell Juſt. agreed, for this was no more than a Nient dedire, and not a plain and expreſs Confeſſion.

1 Salk. 216. Mod. Caſes 1. Where the Defendant is out of Court by Default there can be no Repleader.

DEMURRER.

Anonimus.

Of Special and General Demurrers, and the Reason of making the Statute 27 *Eliz.*

(1.) PER Holt Ch. Juſt. There were Special Demurrers at Common Law, but they were never neceſſary but in Caſes of Duplicity, and therefore they were ſeldom practiſed; for as the Law was then taken to be upon a Special Demurrer, the Party could take Advantage of no other Defect in the Pleading, but to that which was ſpecially aſſigned for Cauſe of his demurring.

(2.) But upon a General Demurrer he might take Advantage of all Manner of Defects, that of Duplicity only excepted; and there was no Inconvenience in ſuch Practice, for the Pleadings being at Bar viva voce, and the Exceptions taken ore tenus, the Cauſes of Demurrer were as well known upon a General Demurrer as upon a Special one; therefore after the Reformation, when the Practice of Pleading at Bar altered, the Uſe of General Demurrers ſtill continued, and thereby this publick Inconveniency followed, that the Parties went on to argue a General Demurrer not knowing what they were to argue, and this was the Occaſion of making the Statute 27 Eliz. by which 'tis enacted, that the Cauſes of Demurrer ſhould be known in all Caſes, and this was reſtorative of the Common Law.

Kiel. 76. Allen. 18.

(3.) Demurrer to the Evidence admits the Truth of the Fact, but denies its Effects in Law; and if ſuch Demurrer is at the Aſſiſes, it ſhall be tried and determined in B. R. or in C. B. &c. and if the

3 Cro. 75.

Demurrer is upon Written Evidence, the Plaintiff muſt join or waive it; otherwiſe, if it is upon Parol Evidence.

1 Lev. 76.

(4.) Many Things have been adjudged ill upon a Special Demurrer, which are otherwiſe upon a General Demurrer; as for Inſtance;

In Treſpaſs, the Defendant pleaded a Deſcent to him as Heir, and did not ſay filio & heredi, or how he was Heir, this is naught on a Special Demurrer.

(5) So in Debt upon a Bond to ſave harmleſs the Defendant pleads indampnificatum ſervavit.

(6.) So petit judiciu' ſi ab actione inſtead of petit judiciu' & damna.

DEPARTURE.

Anonymus. Hill. 2 Annæ, B. R.

(1.) IN Treſpaſs, Aſſault and Battery, it was ruled by Holt Ch. Juſt. that where the Plaintiff laid the Aſſault to be done on ſuch a Day, and the Defendant in pleading ſome Special Matter juſtifies on another Day, ſo that now by this Pleading the Day is made material, yet the Plaintiff in his Replication may alledge the Aſſault to be done on another Day, and that this is no Departure; 'tis true, it hath been held otherwiſe, but the later Opinions are, that the Day is not material, and that the Plaintiff may maintain his Declaration.

Aſſault laid to be done on ſuch a Day, &c. The Day is not material.

(2.) In Replevin, the Defendant pleads, liberum tenementum, and Damage-feaſant there; the Plaintiff in his Replication confeſſes, that the Defendant was ſeiſed in Fee, but made a Leaſe dated 26 May to W. R. habendum from the Date, for thirty Years; the Defendant rejoined, that the ſaid W. R. regranted to him the ſaid Term for thirty Years, habendum from the 25th Day of May in the ſame Month: Adjudg'd this is a Departure, for the Day is to be excluded, and then there is a Reverſion for one Day left in W. R. the firſt Leſſee, ſo that the Defendant is Tenant for Years, Reverſion for one Day to W. R. Remainder to the Defendant in Fee; now when the Defendant pleaded a Freehold, it muſt be intended a Freehold in Poſſeſſion, which he ſhould have maintained in his Rejoinder.

1 Roll. Rep. 388. What is a Departure.

(3.) A Departure, in Latin Deceſſus, is a Going off to new Matter of Juſtification; as for Inſtance, where the Defendant pleads no Award made, and then rejoins, it was not tendered; ſo where he pleads Non damnificatus, and then rejoins de ſon tort Demeſne, but where in Covenant the Defendant pleads Performance, the Plaintiff replies, he would not attempt; the Defendant rejoins, he was robbed; this was held no Departure.

1 Lev. 85, 127.

(4.) That which is pleaded at Common Law cannot be maintained by Cuſtom, as where the Plaintiff brought an Action of Co-

Sid. 142.

venant; the Defendant pleaded Infancy, and the Plaintiff replied the Custom of London to charge Infants.

1 Lev. 81. (5.) But if the Defendant plead a Statute, and the Plaintiff replies, it is repealed or expired, the Defendant may resoin, that 'tis revived or continued, as the Case is, and this is no Departure.

DEPUTY. *See* Office 8.

Barker *versus* Kett. Pasch. 13 Will. III. B. R.

1 Salk. 25. Deputy may act in his own Name. (1.) THIS Case is reported in 1 Salk. by the Name of Parker versus Kett, to which may be added, as then adjudged, (viz.) That a Deputy may act in his own Name as well as in the Name of his Principal; and Combe's Case in the ninth Report, is not contrary; for tho' 'tis there held, that he who acts as an Attorney must Use the Name of his Principal, yet the Judgment in that Case is otherwise.

(2.) That where a Man hath an Interest and an Authority, and doth an Act without reciting his Authority, it may be intended to be done by Vertue of his Interest, as in * Cleer's Case; but where a Man hath an Authority only, and doth an Act which cannot be good but by Vertue of that Authority, it shall be intended to be done in Pursuance and Execution of that Authority, tho' 'tis not recited so to be done.

* 6 Rep.

5 Eliz. Dyer. (3.) Anno 18 H. 7. the King granted the Office of Remembrancer of the Exchequer to one Robert Blague, to exercise by himself or per sufficientem Deputatum, and Anno 3 H. 8. he was made a Baron of the Exchequer quam diu se bene gesserit, and yet he still continued to exercise that Office by Deputy.

Plow. Com. 381. (4.) A Steward of a Manor cannot make a Deputy without Special Words in his Patent enabling him so to do; because 'tis

an Office of Truſt and Knowledge, which are Qualities annexed to his Perſon.

(5.) Upon a Bill in the Dutchy Court, the Queſtion was, Whether a Stewardſhip of a Manor could be granted in Reverſion; and adjudged, that it might, becauſe it may be granted in Fee, or for any leſſer Eſtate, and ſo in Reverſion, becauſe it may be granted to be exerciſed per ſe, vel ſufficientem Deputatum; Sir Robert Howard's Caſe. 2 Mod. 173.

DEVASTAVIT.

(1.) Adjudged, that Payment of an uſurious Bond is a Devaſtavit, but a Delivery of Goods fraudulently ſold by the Teſtator himſelf, is not.

(2.) Payment of a Legacy before a contingent Covenant broken is not a Devaſtavit, but if after 'tis broken, 'tis a Devaſtavit.

(3.) Payment of a Statute whilſt a Writ of Error is depending upon a Judgment precedent to the Statute is not a Devaſtavit.

(4.) In Equity, the Executor of an Executor is liable as far as he hath Aſſets, but he is not ſo at Law; now by the Statute 30 Car. 2. cap. 7. the Executor or Adminiſtrator of a wrongful Executor is liable for a Devaſtavit of the wrongful Executor.

(5.) After Aſſets found, or Judgment upon a Demurrer, the Sheriff muſt return Aſſets or a Devaſtavit, (i. e.) he ſhall not return nulla Bona generally, but he may return nulla Bona in the ſame County.

(6.) An Executor pleaded a Note of 5000 l. which, with Intereſt, amounted to 7000 l. and a Judgment thereupon not ſatisfied, this was adjudged ill; for if Intereſt did run in the Time of the Executor, it was a Devaſtavit in him to ſuffer it, unleſs there was a Defect of Aſſets, which ſhall not be intended, and therefore the Defendant ought to have ſhewed ſuch Defect, if there was any. 2 Lev. 40.

(7.) A

2 Lev. 161. Feme Covert surviving her Husband shall be charged in a *Devastavit* by him.

(7) A Feme Covert, who was Executrix, survived her Husband, she shall be charged for a Devastavit committed or done by him; so likewise if the Plaintiff had recovered against her Husband whilst living, for a Devastavit during the Coverture, and then the Husband dies, the Widow shall be charged for the Damages, but not for the Costs.

DEVISE.

1 Vent. 215. Devise to *W. R.* for Life, Remainder to his Heir is a Fee-simple.

(1.) ADjudged, that a Devise to W. R. for Life, Remainder to his Heir, is a Fee-simple, for Hæres est nomen collectivum; but if he add, and to the Heirs of such Heir, it is for Life only, for Words of Limitation being added to the Word Heir, it shall be taken as designatio personæ.

1 Vent. 228. Devise to *W. R.* and to the Issue of his Body is an Estate-tail, if he hath no Issue at that Time.

(2.) A Devise to W. R. and to the Issue of his Body, if he have no Issue at that Time, 'tis an Estate-tail, and the Word Issue is a Word of Limitation, for otherwise it would signify nothing; but 'tis otherwise if the said W. R. had Issue at that Time, for then 'tis a joint Devise, or if it be the Remainder to the Issue of the Body of W. R. for then they take a Remainder in præsenti, as Purchasers.

1 Vent. 230. Devise to *W. R.* and the Heirs Males of his Body, is an Estate in Tail male.

(3.) A Devise to W. R. and the Heirs Males of his Body, and if he die without Issue, &c. is only an Estate in Tail male, for an Implication of an Estate of Inheritance shall never ride over an express Estate limited before.

1 Vent. 232. Devise to his Heir male is an Estate-tail.

(4) A Devise to W. R. for Life, and afterwards to his Heirs male, is an Estate-tail; but it would not be so if the Estate was limited to his Heir male, and the Heirs of the Body of such Heir male.

1 Vent. 225. To the Issue of his Body is an Estate-tail.

(5.) The Testator had three Sons, and he devised his Lands to his third Son for Life, and after his Death to the Issue of his Body by a second Wife, with Power to make her a Jointure, this is an Estate-tail, for the Word Issue is nomen collectivum, and equivalent to Heir.

(6.) The Teſtator deviſed a Moiety of his perſonal Eſtate to his Wife, and then ſeveral Legacies to others, and the Reſidue to another. Et per Curiam, the Wife ſhall have a full Moiety, and then the Debts ſhall be paid and deducted out of the other Moiety, if that be ſufficient; and if there is Money, Bonds and a Leaſe for Years, the Wife ſhall have a Moiety of the Leaſe.

Ch. Rep. 16. Deviſe of a Moiety to the Wife, ſhe ſhall have a full Moiety.

(7.) The Husband deviſed his Goods to be ſold for the raiſing Portions for his Daughters, and that if the Goods were not ſufficient for that Purpoſe, then the ſame to be raiſed out of the Rents, Iſſues and Profits of his Leaſe Lands; the Queſtion was, whether the Leaſes might be ſold, if the Goods were not ſufficient? Et per Finch Lord Chancellor, the Deviſe of the Annual Profits gives no Power to ſell, but a Deviſe of the Profits doth, and the affirmative Words ſhall hinder the Power in this Caſe of a Chattel, as it might in caſe the Land had been Freehold.

Ch. Rep. 240. Deviſe to raiſe Portions out of the Profits, is a Power to ſell.

(8.) A Writing was made in this Form (viz.) This Indenture made between, &c. whereas, &c. now in Conſideration of 5 s. he bargains and ſells to the Parties to be diſpoſed in Manner following, All the Reſt I give and bequeath, &c. and I make the ſaid Parties my Executors, this was adjudged a good Will.

Ch. Rep. 249. What ſhall be a good Will, tho' informal.

(9.) The Father ſettled a Leaſe, with Reference to his Will, in which he gave 500 l. to each of his Daughters, to be paid at the Age of twenty-one, and if any or all died before that Age, then to others, but deviſed no Maintenance to them till their Portions became payable. Et per Curiam, a Maintenance cannot be decreed, becauſe of the Deviſe over.

Ch. Rep. 249. Deviſe of Portions to be paid at 21, and if die before, then to others, a Maintenance cannot be decreed, becauſe of the Deviſe over.

Fiſher *verſus* Nicholls.

(10.) THE Conſtruction of Wills is more favoured in Law to fulfil the Intent of the Teſtator, than any Deed or Conveyance executed by him in his Life-time.

Antea Copyhold 1.

Therefore, where a Man by Deed gives Lands to W. R. and his Aſſigns for ever, this is only an Eſtate for Life; but in a Will theſe very Words make an Eſtate in Fee.

What makes a Fee-ſimple by Will.

So a Deviſe to W. R. being his eldeſt Son, and his Heirs, after the Death of his Wife, this is a good Eſtate for Life by Implication in the Wife; but 'tis not ſo in a Deed.

Cro. Car. 366. Jones 343.

Now per Holt Ch. Juſt. The Reaſon of this Diverſity is not only, that the Teſtator is intended to be inops Concilii, but becauſe a Deviſe is not a Conveyance by the Common Law, but by the Statute; 'tis true, there were Deviſes before the Statute of

Deviſe is not a Conveyance by Common Law, but by Cuſtom.

of H. 7. but those were not by Common Law but by Custom, as in Cases of Burgage Lands; now as Custom enabled Men to dispose their Estates in this Manner, contrary to the Common Law, so it exempted this Kind of Conveyance from the Regularity and Propriety required in other Conveyances; and thus it came to pass, that Wills upon the Statute, in Imitation of those by Custom, gained such favourable Construction.

2 Lev. *Bowman* v. *Milbank.* Where the Heir shall not be disinherited, because the Will was doubtful.

(11.) Adjudged, that when the Devise was in those Words, I give all to my Mother, that by these Words the Heir was not disinherited, because 'tis incertain what was intended by that Word All; tho' it was insisted, that it included the whole Estate both Real and Personal, for qui omne dat nihil excipit.

1 Lev. 11. Where the Devise is only of an Estate for Life.

(12.) Devise to his eldest Son for Life, and if he die without Issue living at the Time of his Decease, then to his second Son and his Heirs; but if his eldest Son hath Issue living at his Death, then the Fee-simple shall remain to his Right Heirs for ever; adjudged, this is an Estate for Life in the eldest Son, which is not drowned in the Reversion he hath as Heir, and that the Remainder to his Right Heirs is not executed but contingent.

1 Lev. 135.

(13.) The Wife was Tenant for Life, Remainder to the Right Heirs of the Husband, who devised his Lands to the Heirs of the Body of his Wife, if they attained to the Age of 14 Years, and died without Issue; this is an executory Devise, and no Remainder to the Heirs of the Wife; for tho' she hath an Estate for Life, yet that was not created by the Devise; but this is a new Estate, and not joined to that of the Wife.

1 Vent. 207.

(14.) Adjudged, That Wills appointing a Guardianship of a Child upon the Statute of Car. 2. cannot be proved in the Ecclesiastical Court; neither can they prove Wills there for Lands, but of Goods and Lands they may.

DESCENT.

(1.) IN immediate Deſcents there can be no Impediment, but what ariſes in the Parties themſelves. 1 Vent. 416.

(2.) The Grandfather is an Alien or attainted, and hath Iſſue the Father, who hath Iſſue a Son, and both Denizens, the Son ſhall be Heir to the Father, notwithſtanding the Diſability of the Grandfather; otherwiſe if the Father had been attainted.

(3.) An Alien hath Iſſue Two Sons, both Denizens, the one may be Heir to the other, tho' neither of them cou'd be Heir to the Father; for the Deſcent between the Brothers is immediate, and there is no Diſability in them, tho' there is in the Father. 1 Vent. 413. 1 Inſt. 87. *contra.*

(4.) A Father attainted hath two Sons, the one may be Heir to the other, for the Deſcent is immediate; and tho' the Father is the medium differens ſanguinis, yet he is not the medium differens hæreditatis. 1 Vent. 416, 428. Co. Lit. 8. a.

(5) In immediate Deſcents, a Diſablity by Attainder or being an Alien, not only in the Parties, but in any intermediate Anceſtor, thro' and by whom the Deſcent is made, is an Impediment, and obſtructs the Deſcent.

(6.) There were three Brothers, all Aliens; the two Youngeſt were naturalized, and the eldeſt had Iſſue, then the third Brother died. Adjudged, that his Land cannot deſcend to his eldeſt Brother, or to his Iſſue, becauſe he was incapable himſelf, and his Iſſue cannot come in but by Repreſentation; ſo they ſhall deſcend to the ſecond Brother.

(7.) Per Holt Ch. Juſt. in his Argument in the Caſe between * Clements and Scudamore, all the Lands in England were of the Nature of Gavelkind before the Conqueſt, and deſcended to all the Iſſue equally; but after the Conqueſt, when Knights Service was introduced, the Deſcent was reſtrained to the eldeſt Son, for the Preſervation of the Tenure. * 1 Salk. 243. Lamb. 167. Seld. Edm. 184.

But in both Caſes, Succeſſion by Right of Repreſentation was allowed, and ſo it has been in all Nations. Seld. de Succeſſ. cap. 23.

DISCONTINUANCE of ACTION. *See* Iſſues joined 9.

Salisbury *verſus* Proctor. Hill. 8 Will. III. B. R.

5 Mod. 304. 2 Salk. 648. Diſcontinuances are helped after Verdict.

(1.) AN Action was brought againſt two Defendants, one joined Iſſue, and the other demurred; the Iſſue was tried, and there was a Verdict againſt that Defendant; ſo that no Day was to be given to him; but as to the other, Day ſhould be given and Continuances entred till Judgment, but none being entred, a Writ of Error was brought, and theſe Diſcontinuances were aſſigned for Error; for being after Verdict they could not be helped by the Verdict. But per Holt. Ch. Juſt. Diſcontinuances are helped as well after the Verdict as before; and ſo it hath been adjudged, for the Statute ſaith, Where the Fact is tried, without relating to Diſcontinuances before more than after a Verdict.

Philer *verſus* Boſon. Hill. 3 & 4 Will. III. B. R.

Statute of *Jeofailes* extends to Inferiour Courts.

(2.) ERror on a Judgment in the Court of Exceſter; the Error aſſigned was the Want of a Continuance, for it was ad proximam Curiam, which is ill in an Inferior Court; but per Curiam, the Judgment being given upon a Verdict this Diſcontinuance is aided; for the Statute of Jeofailes extends to Inferior Courts, and muſt be favourably conſtrued to give a Remedy, and the Words are, any Diſcontinuance, Miſcontinuance or Miſconceiving of Proceſs, which are general Words, and applicable to all Courts of Law.

Anonymus. Paſch. 5 Will. III. B. R.

(3.) IN Treſpaſs and Battery againſt Husband and Wife, the Diſcontinuance helped by Verdict. Original, as recited in the Declaration, was of a Battery only at one Time, but the Declaration it ſelf was of ſeveral Batteries done by them at ſeveral Times, to which ſeveral Batteries the Defendants pleaded; and the Plaintiff replied as to one of them only, upon which they were at Iſſue, and it was found for the Plaintiff: Et per Curiam, the Original not being ſet out by craving Oyer, we will intend it to be Right, but miſrecited at the Top of the Declaration; and the Plaintiff not replying to one of the Batteries, is but a Diſcontinuance, which is helped by the Verdict.

(4.) After a Demurrer argued, the Court will not give Leave to diſcontinue in an Action of a Debt upon a Bond to perform an Award. 1 Lev. 140.

(5.) But 'tis not ſo in an Action of Debt for an Eſcape. 1 Lev. 191.

(6.) Nor in an Action of Debt upon a Bail-Bond, nor in Debt upon a Bond to accompt, nor in an Aſſumpſit upon an accompt ſtated. 1 Lev. 227. 1 Lev. 295.

(7.) There ſhall be no Diſcontinuance before Judgment in the King's Caſe, and therefore, if after Iſſue joined and tried for Part, it ſhould be moved in Arreſt of Judgment, that there is a Diſcontinuance as to the Part; this may be aided, for the King may either take Iſſue upon it, or enter a Nolle proſequi to help the Diſcontinuance. Hard. 504.

(8.) Miſcontinuance is a Wrong doing, but a Diſcontinuance is not doing a Thing; as per Holt Ch. Juſt. A. ſues the Hundred for the Robbery of B. his Servant, the Hundred imparles, and idem dies dat' eſt præd' B. now after Verdict, the Defendant is ſine die in Court, unleſs 'tis to move in Arreſt of Judgment.

(9.) After a Special Verdict the Court may give Leave to diſcontinue, for 'tis not a compleat Verdict, but this is a Favour. Hill. 5 Will. 3. Reev v. Golden.

(10.) Diſcontinuances are either to the Prejudice of the Heir, or of the Succeſſor, or of the Wife, or of him in Remainder or Reverſion, or of the Jointreſs. Per Stat. 11 H. 7. cap. 20. or againſt the Tenant by the Curteſy, with Warranty by the Statute of Glouceſter, cap. 13.

(11.) A Diſcontinuance to the Prejudice of the Succeſſor is remedied by the Statutes 1 & 13 Eliz. and 1 Jac. cap. 3.

(12.) A Diſcontinuance to the Prejudice of the Heir is hindered by the Statute 32 H. 8. by which 'tis enacted, that the Wife or Heir may enter.

(13.) But Diſcontinuances to the Prejudice of Remaindermen and Reverſioners ſtill continue.

(14.) Some Diſcontinuances diſplace or deveſt the Eſtate only, others not only diſplace and deveſt it, but take away the Entry, and this is properly a Diſcontinuance; and 'tis where he who aliens hath an Inheritance, either in his own Right or in the Right of another, as Tenant in Tail; as for Inſtance, where the Husband is ſeiſed in Right of his Wife, for they not only deveſt the Eſtate, but the Wife or Iſſue to their Action, by taking away their Entry.

(15.) Some Diſcontinuances gain a Reverſion in Fee determinable, and ſome an abſolute Fee; if Tenant in Tail make a Leaſe for the Life of the Leſſee, this is a Diſcontinuance of the Eſtate-tail and the Reverſion, and therefore the Tenant in Tail hath gained a tortious Reverſion in Fee, but determinable upon the Life of the Leſſee.

(16.) For if Tenant in Tail make a Gift in Tail to W. R. if he die without Iſſue, the Diſcontinuance is determined; but if he make it in Fee, this is a Diſcontinuance for ever.

(17.) Tenant for Life, Reverſion to W. R. in Tail, who bargained and ſold to W. W. in Fee, and then levied a Fine of his Reverſion to B in Fee; adjudged, that W. W. had nothing by the Bargain and Sale, but an Eſtate for the Life of his Bargainor deſcendible to his Heir as a ſpecial Occupant: But the Fine having only barred and extinguiſhed the Eſtate-tail, and having paſſed nothing to the Cogniſee, the Eſtate of the Bargainee is become a baſe Fee, deſcendible to his Heirs as long as the Bargainor has Heirs of his Body. See Took verſus Glaſcock.

(18.) The Husband covenanted to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs Males of their two Bodies, Remainder to his eldeſt Son W. R. who was born of the firſt Venter, &c. afterwards the Husband and Wife levy a Fine to W. W. in Fee, with Warranty, and die without Iſſue male, by Reaſon whereof the Eſtate

deſcended on W. R. the eldeſt Son of the Coguiſor: adjudged, that this Fine and Warranty was no Bar, becauſe a Warranty cannot be a Bar to the Eſtate-tail of W. R. the eldeſt Son, unleſs that Eſtate was diſcontinued, and it could not be diſcontinued, unleſs the Eſtate-tail to the Cogniſor was diſcontinued and diſplaced by the Fine and Warranty; and here the Eſtate-tail to the Husband and Wife was not diſcontinued, becauſe they were not ſeiſed of it at the Time of the Fine levied; for they were not ſeiſed in their Demeſne as of Fee-tail, but the Husband was Tenant for Life, Remainder to the Wife for Life, Remainder to the Heirs Males of their two Bodies, ſo that theſe are diſtinct Eſtates which cannot unite, and by Conſequence the Eſtate for Life is not drowned in the Eſtate-tail. See the Caſe, Stephens verſus Britteridge.

DISSENTERS, &c.

Hilton *verſus* Byron. Paſch. 11 Will. III. B. R.

(1.) THE Plaintiff Hilton, being a Quaker, moved for an Attachment againſt Byron, offering to take his ſolemn Affirmation, according to the late Act, that he went in Danger of his Life; but the Motion was denied, unleſs he would take his Oath in common Form, becauſe this was a criminal Caſe, and not within the Statute.

Criminal Caſe not within the Statute, for the Eaſe of Quakers.

The Queen verſus Ride. Mich. 3 Annæ, B. R.

(2.) A Popiſh Recuſant convict made his Wife Executrix, and afterwards ſhe was permitted by the Spiritual Court to prove the Will; but a Prohibition was granted, becauſe ſhe is diſabled by the general Clauſe of the Statute Eliz. cap. 4. Par. 22. and not enabled by the Proviſo.

The Wife and Executrix of a Popiſh Recuſant convict cannot prove his Will.

The

The King versus Larwood.

4 Mod. 269. 1 Salk. 167.

(3.) Information against the Defendant for not taking upon him the Office of Sheriff of Norwich: He pleaded the Statute * 13 Car. 2. that he had not qualified himself, for that he had not taken the Sacrament as enjoined by that Statute, according to the Usage of the Church of England, &c. The Attorney-General replied, that he was obliged by Law, and ought to have received the Sacrament, &c. The Defendant rejoined, that he was a Protestant Dissenter, and exempted by the Toleration-Act, which he set forth; and upon a Demurrer to this Rejoinder it was adjudged, that this is a private Act, of which the Court cannot take Notice without Pleading it; that by several other * Statutes all Persons are to observe the Discipline of the Church of England; that the Law took no Notice of Dissenters before this Act of Toleration, which extends only to such Dissenters who take and subscribe the Declaration at the Quarter-Sessions; that the Statute 13 Car. 2. now pleaded by the Defendant, doth not exempt Men from serving in Offices to which they were obliged before that Act was made, but to qualify them to execute it, and that the Subject cannot be exempted from this Office, but by Act of Parliament or a Grant from the King.

* Cap. 1. The Subject cannot be exempted from the Office of Sheriff, &c.

* 1 & 23 Eliz.

DISSEISIN.

1 Lev. 45, 270.

(1.) The Lessor made a Lease to W. R. for eighty Years, to commence next Michaelmas, if W. W. should so long live, and after the Death of W. W. for thirty-one Years longer: W. R. the Lessee, entered before Michaelmas, and continued the Possession afterwards; the Lessor entered upon him, and then the Lessee assigned over the Term: Et per Curiam, the Entry of W. R. the Lessee before Michaelmas, was a Disseisin to the Lessor and not a Possession by Vertue of the Lease; and therefore the Entry of the Lessor did not disturb the Possession of the Term, for in that respect he is not possessed but only by the Disseisin, which is hereby purged, and by Consequence the Term is well assignable.

(2.) So 'tis, if a Stranger had entered on the Leſſee, that would not have turned the Term to a Right, becauſe he was not poſſeſſed by Vertue of the Term.

(3.) But if Leſſee for Years had ſtaid till Michaelmas-Day, and then had entred, and afterwards the Leſſor had entred on him, it would have turned the Term to a Right, becauſe he had a Poſſeſſion by Vertue of the Term, which being deveſted he cannot aſſign in ſuch Caſe before Entry.

Page *verſus* Heyward. Trin. 3 Annæ.

THIS Caſe is reported in 2 Salk. quod vide, in which it was held per Holt Ch. Juſt. That a bare Entry on another, without an Expulſion, makes only a Seiſin, ſo that the Law will adjudge him in Poſſeſſion who hath the Right, and ſo are the Words to be underſtood in a Special Verdict. 2 Salk. 570. Entry without an Expulſion makes only a Seiſin.

Vide. Intravit & fuit inde ſeiſitus prout lex poſtulat; but it will not work a Diſſeiſin or Abatement, without an Expulſion.

DISTRESS.

Stanfitt *verſus* Hicks. 9 Will. III. C. B.

(1.) THE Caſe was, there was a Leaſe made for one Year, and ſo from Year to Year as long as both Parties pleaſed, by Vertue whereof the Leſſee entered, and was in Poſſeſſion for two Years and an half, and the Rent being in Arrear the Leſſor diſtrained, and adjudged, that he could not by Law, becauſe by this Agreement there was an Eſtate for two Years created, and no more; the other was a growing Intereſt or Eſtate at Will, which, being a diſtinct Eſtate from the firſt, cannot be ſubject Where a Diſtreſs was after the End of the Term.

ſubject to the Arrears of the firſt. The Repoꝛter tells us the Law is contrary.

Howell *verſus* Bell. Mich. & Hill. 8 Will. III. B. C.

Where an Executor may diſtrain for Rent in Arrear to the Teſtator.

(2.) IN Replevin, the Defendant avowed, foꝛ that W. R. was ſeiſed of the Place where, &c. in Fee, and being ſo ſeiſed he granted a Rent-Charge out thereof to W. W. for Life, that W. W. is dead, and that he (the Defendant) was his Executor, and diſtrained in the Place where, foꝛ ſo much Rent in Arrear, and due to his Teſtatoꝛ in his Life-time; but did not aver, that the Place where, &c. was then in the Seiſin of the Gꝛantoꝛ of this Rent, oꝛ any other Perſon who claimed by, from oꝛ under him; and upon a Demurrer to this Avowꝛy Holt, Ch. Juſt. held, that the Executoꝛ might diſtrain either on the Gꝛantoꝛ oꝛ any other Perſon, who comes in by oꝛ thꝛo' him, and if the Plaintiff is not liable to the Diſtreſs, 'tis moꝛe natural foꝛ him to ſhew it in his Replication, foꝛ his own Defence. Beſides, the Statute which impowers Men to diſtrain, is a Remedial Law, and theꝛefoꝛe ought to be expounded accoꝛding to Equity, and extended accordingly, and the Woꝛds theꝛein being Executors of Tenants for Life may ex vi Termini include all Tenants for Life.

Anonymus. Mich. 8 Will. III. C. B.

Where Cattle may be diſtrained, tho' not *levant* and *couchant*.

(3.) IF Cattle eſcape by the Default of the Owner, on the Lands of the Leſſoꝛ, he may diſtrain them foꝛ Rent, tho' not levant and couchant; but if ſuch Eſcape be thꝛo' the Default of the Leſſee, in not repairing the Fences, the Leſſoꝛ cannot diſtrain them till they are levant and couchant; foꝛ if the Leſſoꝛ had the Lands in his own Hands, he muſt repair the Fences, and conſequently he muſt ſee, that his Leſſee doth it, foꝛ he is not to take Advantage of his own * Default.

* See the King v. *Larwood*.

Where a Diſtreſs ſhall be made for Utenſils of Husbandry.

(4.) Adjudged, that the Rule of the Common Law, which exempts Utenſils, Tools, Inſtruments of Husbandry, &c. from Diſtreſs, holds only in Diſtreſſes for Rent Arrear, Amerciaments, &c. but doth not extend to Caſes where a Diſtreſs is given in the Nature of an Execution by any particular Statute, as foꝛ Poor Rates, &c.

2 Lutw. 1380. Where a Diſtreſs is well pleaded.

(5.) Treſpaſs foꝛ taking two Sheep; the Defendant juſtifies for Toll (viz.) Quod cepit & diſtrinxit the ſaid Sheep foꝛ Toll, and the ſame did carry away, as he lawfully might; it was doubt-

ed, whether this was a good Plea, because he did not say cepit & asportavit nomine districtionis; but it seems clearly to be naught, if he had not set forth before that cepit & distrinxit.

(6.) In Trespas for taking ten Beasts 1 April, and also for taking other twelve more on the said first Day of April: The Defendant pleaded, that the Plaintiff had a Lease granted to him, rendring Rent, and that there was 70 l. Rent in Arrear, and that he (the Defendant) did take the first ten Beasts for 60 l. Parcel of the said 70 l. and the other twelve Beasts afterwards, for 10 l. Residue of the said 70 l. and upon a Demurrer to this Plea, it was adjudged ill; for one cannot avow for two Distresses made for one and the same Rent; it was the Defendant's Fault to distrain too little at first.

2 Lut. 1536. Where two Distresses cannot be for one Rent.

But the Reporter tells us, that if the Defendant had pleaded, that at the Time of taking the first Distress, there was not sufficient to be taken for the whole Rent, upon the Land, and that the first Distress was but only of such a Value, it had been good.

DISTRIBUTION.

(1.) An Administrator at Common Law was bound to distribute the Surplus of the Intestates Estate; but this was altered by the Statute 21 H. 8. cap. 15. by which he is not compellable, tho' he accepted the Administration upon that Condition; and this again is altered by the Statute 22 & 23 Car. 2. cap. 10. by which he is compellable to make Distribution, yet an Estate per auter Vie is not to be distributed, tho' it be within that Act; as for Instance.

Administrator bound to make Distribution.

Oldison *versus* Pickering. Mich. 8 Will. III.

(2.) In this Case it was adjudged, that tho' an Estate pur auter Vie is made Assets by the Statute 29 Car. 2. yet 'tis not Distributable within the Statute 22 Car. 2. for Distribution of Intestates Estates, because Distribution is a Quality not necessarily included in the Notion of Assets, as Payment of Debts is; and this last Statute is only, that Goods and Chattels

2 Salk. 464. Estate *pur auter Vie*, is not distributable.

shall be distributed; now an Estate pur auter Vie is not properly Goods or Chattels, but remains a Freehold, tho' 'tis Assets by the first Statute.

Pett *versus* Pett.

1 Salk. 250. Administration shall be granted to the Aunt and not Distribution to the Children of the Uncle.

(3.) AN Intestate, having neither Father or Mother, Wife or Children, but only a Sister of his Father, and two Daughters of his Father's Brother; a Motion was made for a Mandamus to the Ordinary to make Distribution, who had granted it to his Father's Sister. Sed per Curiam, by the Statute 22 Car. 2. there shall be no Distribution amongst Collaterals after Brothers and Sisters Children of the Intestate; for that Statute is a Restraint on the Common Law, and therefore shall not be carried farther than the Letter, and after such Collaterals, it shall go to the next of Kin to the Intestate, which in this Case was to his Father's Sister.

DIVORCE.

Noy 100.

(1) A Divorce a Vinculo matrimonii is a Bar of Dower; but a Divorce a mensa & Thoro is not, for the Marriage still continues, and therefore the Parties thus divorced, cannot marry again during their joint Lives.

Glan. 44. Bract. 92. 18 Ed. 4. 45.

(2.) A Divorce for Adultery was antiently a Vinculo matrimonii, and therefore in the Beginning of the Reign of Queen Eliz. the Opinion of the Church of England was, that after a Divorce for Adultery, the Parties might marry again; but in Foliamb's Case, Anno 44 Eliz. in the Star-Chamber, that Opinion was changed, and Archbishop Bancroft, upon the Advice of Divines, held, that Adultery was only a Cause of Divorce a mensa & thoro.

Cro. Eliz. 853.

(3.) Debt upon Bond against Cecilia Wogan, alias dict' Cecilia, late Wife of John Englebert: The Defendant pleaded, that at the Time of the making this Bond, she was the Wife of John Englebert, who was still living, & sic non est factum. The Plaintiff replied, that the said Cecilia and the aforesaid Englebert

were divorced, for that he had another Wife: Et per Curiam, the Sentence of Divorce is but declaratory; the Marriage was void, ab initio, and therefore the Woman was always sole, and by Consequence her Bond good.

The King versus The Lord Lee.

(4.) UPON the Complaint of the Wife of the ill Usage of the Husband, a Habeas Corpus was directed to him to bring her into Court, who appearing, and several Affidavits being read of the hard and severe Usage, and of her Confinement, and that she was in Danger of her Life; and she her self making Oath of this Matter, the Court bound him with Sureties for his Good Behaviour, but they would not separate and remove her from him.

2 Lev. 138. Wife not separated from her Husband by hard Usage, but he bound to his Good Behaviour.

DOGS.

(1.) THE Law takes Notice of a Greyhound, a Mastiff, a Spaniel and Tumbrel, for Trover will lie for them; and tho' a Man hath a Property in a Mastiff, yet the Thing is of so base a Nature, that 'tis not * Felony to steal a Mastiff.

1 Cro. 125. 2 Cro. 44. * 7 Rep. 18.

(2.) Where a Mastiff falls upon another Dog, the Owner of that Dog cannot justify the Killing the Mastiff, * unless there was no other Way to save his Dog; and therefore in Trespass for killing his Mastiff, if the Defendant plead, that the Mastiff fell upon the Dog, and that he killed the Mastiff least he should worry the Dog, 'tis naught, for, perhaps, he might have saved him otherwise; but if he plead, that he could not take him off, nor part them, nor prevent the Worrying of his Dog otherways than by Killing the Mastiff, this is a good Justification: Et per Curiam, the Owner of a Mastiff is not bound to muzzle him, unless he be found to be mischievous.

* 1 Saund. 84.

(3.) Trespass for Killing his Dog, the Defendant justified, for that he was Owner of a Warren, and that the Dog was there several Times killing Coneys, and then was running after them

1 And. 135. 2 Cro. 44.

to kill them: Et per Curiam, this is a good Juſtification, for 'tis the Uſage to kill Cats and Dogs in Warrens.

Dyer 25. (4.) If a Dog kill a Sheep, not being uſed ſo to do, nor by the Encouragement of another; ſed fortuito, the Maſter is not liable, no, tho' accuſtomed to kill Sheep, unleſs the Maſter did know it.

Chambers *verſus* Warkhouſe.

3 Lev. 336. Where a Man may have a Property in a Dog. (5.) TRover de ſex Catulis & quatuor Catellis, after a Verdict for the Plaintiff it was objected, that Catulis ſignified little Whelps, and Catellis Whelps of any Sort, as of Dogs, Foxes, &c. beſides, a Man cannot have any Property in Whelps: Sed per Curiam, it ſhall be intended Whelps of Dogs, and a Man may have a Property in a Dog, for Treſpaſs lies for taking away * Canem Venaticam, and the like Action for killing a † Maſtiff.

* Hob. 283. Dyer 306. † 2 Cro. 463.

DONATIVE.

The Ordinary hath Power as to the Parſon but not to the Place. (1.) DOnatives are either by Royal Foundation or by Royal Licenſe, or by original Agreement with the Ordinary; but after 'tis eſtabliſhed, the Ordinary hath nothing to do with it, 'tis viſitable by the Patron's Commiſſioners, it muſt be reſigned to the Patron, no Lapſe can incur: But per Holt Ch. Juſt. the Ordinary hath a Power as to the Parſon, tho' not to the Place; for if the Parſon marries without a Licence, or commits any Misdemeanor, the Ordinary may puniſh him in that reſpect, but he cannot regulate the Seats in the Church; and if the Patron will not preſent, the Ordinary may compel him; the Parſon is exempted from Attendance at Viſitations.

Yel. 61.

A Preſentation will not deſtroy a Donative. * 2 Salk. 541. (2) It has been formerly held, that a Donative may be diſtrained by the Preſentation of the very Patron; but in * Ladd and Widdow's Caſe it was adjudged by Holt Ch. Juſt. and the Court, that tho' a Preſentation might deſtroy an Impropriation, it could not deſtroy a Donative, becauſe the Creation thereof

was by Letters Patents, by which the Land was ſettled to that Parſon and his Succeſſors, and he to come in by Donation: Et per Jones Juſt. Inſtitution to Churches was not a Temporal but a Papal Inſtitution, which was not received in ſome Places in England; and where it was not received they went on in their old Way and Method, and are called Donatives.

(3.) The Incumbent of a Donative was cited into the Spiritual Court to take a Licenſe from the Biſhop to preach; and the Pretence was, that it was a Chapel, and that the Parſon was ſtipendiary: Et per Curiam, If 'tis a Donative, and the Biſhop will viſit, a Prohibition ſhall be granted.

1 Mod. 96. Biſhop not to viſit a Donative.

DOUBLE PLEA.

Lamplugh *verſus* Shortridge. Paſch. 13 Will. III. B.R.

There is a ſhort Note of this Caſe in 1 Salk. but the Caſe was thus: It was a Writ of Error upon a Judgment in the Common Pleas in an Action of Covenant, and the Error aſſigned was for Duplicity, (viz.) by Pleading, that by ſuch a Deed he releaſed and confirmed, which is double, and ſo is he *granted: Et per Holt Ch. Juſt. where it appears, that the Conveyance pleaded cannot enure by Way of Releaſe and Confirmation, there to plead, that by that Conveyance relaxavit and confirmavit is double, becauſe the Deed cannot enure to both Purpoſes, as a Bargain and Sale, or a Feoffment, but where the ſame Deed may enure to both Purpoſes, as a Leaſe and Releaſe doth, there 'tis not double.

1 Salk. 219. Where a Plea is double, where not.

*1 Saund. 78. 2 Saund. 97. Sid. 86. 1 Vent. 109.

Gaile

Gaile *verſus* Betts.

1 Mod. 227. Where a Plea is not double.

DEBT upon Bond, the Defendant craved Oyer of the Condition, which was to pay 40l. ſo long as the Defendant ſhould enjoy ſuch an Office, by quarterly Payments every Year; then he pleads, that the Office was granted to three for their Lives, and that he enjoyed it as long as they lived, and ſo long he paid the ſaid Rent quarterly: The Plaintiff replied, that he (the Defendant) enjoyed the Office longer, and that he had not paid the Money by quarterly Payments; and upon Demurrer to the Replication it was objected, that it was double: Sed per Curiam, it is not, for the Defendant cannot in his Rejoinder tender an Iſſue upon Payment of the Money, becauſe that would be a Departure from his Plea.

Eccleſiaſtical Things and Perſons.

(1.) ECcleſiaſtical Courts are either immediately derived from the Crown, as a Court of Commiſſioners, for by the Common Law the King may grant a Commiſſion to hear and determine Eccleſiaſtical Cauſes and Offences, according to the Eccleſiaſtical Laws, but not to uſe any temporal Puniſhment, as Fine and Impriſonment without the Help of an Act of Parliament.

(2.) Or ſuch Courts are not derived immediately from the Crown, and thus the Law hath annexed to certain Officers an Eccleſiaſtical Juriſdiction as incident to their Office, as in the Caſe of a Biſhop, who is Judex Ordinarius within his Dioceſe; and ſo of an Archdeacon; and tho' the Proceſs runs in the Name of the Biſhop, yet the Authority and Juriſdiction is from the Crown, like the Proceſs of Counties Palatine, which are in the Name of the Count; yet 'tis not to be doubted but the Palatine Juriſdiction was originally from the Crown; and therefore the King hath a ſuperintendent Power over theſe Courts, as he is Cuſtos utriuſq; Tabulæ.

(3.) Now

(3.) Now as to Cauſes determined in theſe Courts it hath been held, that Matrimonial and Teſtamentary Caſes were antiently determined in the Temporal Courts, for they are not in their Nature Spiritual; that the Proceedings in theſe Courts are either between Party and Party, or ex Officio, as publick Proſecutions, &c. but theſe cannot be without a Preſentment, and the Party Preſenting muſt be upon Oath, unleſs it be a publick Perſon, as a Parſon, Vicar, &c.

(4.) And none but thoſe in Orders can exerciſe Eccleſiaſtical Jurisdiction in theſe Courts by the Canon Law; but now by the Statute 37 H. 8. Doctors at Law may; and in ſuch Caſes the Chancellor of the Biſhop, who is uſually a Doctor of Law, is Judge, and therefore the Biſhop himſelf may ſue before him, as the King doth before his Judges, in his own Courts. Hob. 78. 1 Vent. 3.

(5.) By the Uſage in England generally the Archbiſhop is Guardian of the Spiritualties, ſede Vacante, in his Suffragan Dioceſes; but of Common Right, and conſequently where ſuch Uſage hath not prevailed, as to all Matters of Juriſdiction, except Ordination, the Dean and Chapter are Guardians of the Spiritualties, and in Caſes of Ordination they call in the Aid of the next neighbouring Biſhop. Dean and Chapter. 2 Vent. 225.

(6.) A Dean cannot make a Proxy to Charge the Poſſeſſions of the Church, who is not of the Chapter; but he and the major Part of the Chapter make a Corporation, and their Acts are good and binding, without the Conſent of the Reſt.

(7.) But a Dean and Chapter cannot act, grant or confirm, unleſs they are capitularitur congregati & ſemel in certo loco, which may be in any Place as well as in the Chapter-houſe; for what they do at ſeveral Times, and in ſeveral Places, may be factum ſingulorum, but cannot be the Act of the Corporation.

(8.) Præcentors of old Foundations are within the enabling Clauſe of the Statute of H. 8. but Leaſes made by the Chanters of Paul's muſt be confirmed, for they are minoris Ordinis, (i. e.) meer Singing-men, and not properly Chanters. Chanter and *Præcentor*. 1 Lev. 113.

The

The Churchwardens of St. Bartholomew's *Caſe.* Mich. 12 Will. III.

ONE Fiſhburne left 25 l. per Annum, for the Maintenance of a Weekly Lecture, and Lecturer to be choſen by the Pariſhioners, and to preach on what Day of the Week they ſhould like beſt. The Pariſhioners fixed on Thurſday, and choſe a Lecturer every Year; and now one Turton being Lecturer, and the Pariſhioners having choſen one Rainer, he was oppoſed by Turton, who would not ſubmit to their Choice, whereupon the Churchwardens ſhut Turton out of the Church; but the Biſhop of London determined in Favor of Turton, and granted an Inhibition and Monition, &c. Sed per Holt Ch. Juſt. a Prohibition was granted to try the Right; for no Man can be a Lecturer without a Licence from the Biſhop or Archbiſhop; but their Power is only as to the Fitneſs of the Perſon; but not as to the Right.

Error of Judgments in Superior Courts.

Lynch *verſus* Coot.

Where the Defendant in Error may bring a *Scire facias quare Executionem non haberet.*

(1.) IN this Caſe it was held by Holt Ch. Juſt. that if the Plaintiff in Error lie ſtill after a Writ of Error brought, this is no Diſcontinuance of the Writ; but that the Defendant in Error hath no other Way but to bring a Scire facias againſt him, to ſhew Cauſe Quare executionem non haberet; and it will be no Plea for the Plaintiff in Error to plead, that there is a Writ of Error depending, but he muſt aſſign his Errors forthwith, after ſuch Scire facias brought; and in this Caſe there is this Difference (viz.) If the Scire facias is entred on the ſame

Roll with the Writ of Error, then he may assign Errors without a Scire facias ad audiendum Errores, otherwise not.

Finch *versus* Renew. Mich. 12 Will. III. B. R.

(2.) IN Partition, the Judgment was, Quod fiat Partitio; but before the final Judgment was given, a Writ of Error was brought, and it was held, that the Record was not * removed for that Cause, whereupon the Writ of Error was quashed.

Where the Record is not removed.

* Because the Writ of Error comes too soon, it will not lie till after the Final Judgment (*viz.*) *Quod Partitio facta sit firma.* 2 Bulst. 104, 114. Moor 643. Cro. Eliz. 635. 11 Rep. 38. Stiles 290.

Lampton *versus* Collingwood. Mich. 6 Will. III.

(3.) IN a Writ of Error brought by the Bail, it was assigned for Error in a Writ of Error, coram vobis residen' in B. R. that there was no Capias but only a Scire facias against the Principal; but it was disallowed, for this is an Error in Fact, but no Error in the Court.

4 Mod. 314. 1 Salk. 262. No *Capias* against the Principal is Error in Fact.

Prinn *versus* Edwards. Trin. 7 Will. III. B. R.

(4.) DEBT upon a Judgment; the Defendant pleaded a Writ of Error depending in the Exchequer-Chamber, and so prayed, that Eat inde sine die quousq; adjudged an ill Plea, because no Resummons lies in this Case, as it doth in Excommengement, and other Cases.

Writ of Error depending, no good Plea.

Badger *versus* Loyd. Mich. 1 Annæ B. R.

(5.) IN this Case it was said, per Holt Ch. Just. that it was adjudged, that pending a Writ of Error, the Plaintiff in the Original Action may enter if he can; for tho' this Writ forecloses the Court, and ties up their Hands, yet it doth not alter the Right of the Parties.

Where the Plaintiff may enter tho' the Writ of Error is depending.

Knoll's *Case*.

(6.) PER Holt Ch. Just. 'Tis beneath the Dignity of the House of Peers (that being the Supreme Judicature) to try Matters of Fact; and for that Reason Errors in Fact, of any

Errors in Fact must be redressed in *B. R.* and not in Parliament.

any Judgments in B. R. must of Necessity be redressed there, and not in Parliament.

Anonymus.

Where a Writ of Error is brought and no Record certified, &c. the Defendant may have a Writ *De Executione judicii.*

(7.) Where a Writ of Error is brought, and no Record certified at the Day of the Return of the Writ, the Defendant in Error taking a Certificate of this Matter from the proper Officer of the Court, where the Writ is returnable, he may take out a Writ De executione judicii of Course, and the Party cannot hinder Execution thereupon, without he brings a new Writ of Error.

Ball *versus* Richards.

1 Vent. 165. Where all must join in a Writ of Error.

(8.) Error of a Judgment in Ejectment against several Defendants, and the Writ concluded ad damnum ipsorum, which must be against all, when it appeared by the Record, that the Judgment was against three, and that all the rest were acquitted; Per Curiam, yet the Writ of Error is well brought, for all must join in the Writ, which is only a Commission to examine Errors; and ad damnum ipsorum may be intended only of those who were found guilty, viz. that they were damnified by this Judgment.

ERROR.

Evans *versus* Roberts. Mich. 2 Annæ B. R.

Mod. Cases 61. An Inferior Court held, *secundum legem mercatoriam juxta consuetudinem Civitatis*, good.

(1.) Error of a Judgment in the Court at Bristol, the Error assigned was, that the Action there was said to be in a Court held before the Sheriffs and Bailiffs of Bristol, secundum legem mercatoriam juxto consuetudinem Civitatis prædict' a tempore cujus contrarium, &c. whereas per legem mercatoriam ought to be before the Mayor of the Staple; but adjudged well enough,

enough, because it was juxta consuetudinem Civitatis, like the Case of the Court of * Piepowders: Then it was objected, that the Writ of Error was directed to the Sheriffs to remove loquelam coram vobis residen', and the Record removed was Loquela, before their Predecessors, Sheriffs: Et per Curiam, where a Fi. Fa. comes to a Sheriff, and he goes out of his Office before 'tis executed, his Successors may execute that Writ, because the Writ is general, and not directed to any particular Sheriff by Name; but 'tis otherwise if it was directed to a Sheriff by Name; a Writ of Error to the Court of Common Pleas is always directed to the Chief Justice of that Court by Name; and there must be no Variance in such Case, but in the principal Case it was held well enough.

* 1 Cro. 46. Saund. 87, 311.

(2.) Adjudged, that upon a Judgment in B. R. a Writ of Error lies, either in Parliament or in the Exchequer-Chamber at the Election of the Party; but upon a Judgment in the Exchequer-Court, a Writ of Error will not lie in Parliament.

On a Judgment in *B.R.* a Writ of Error will lie, either in Parliament or in the Exchequer-Chamber.

(3.) The Defendant was indicted in B R. and found guilty, and he brought a Writ of Error in the same Court, and assigned Error in Law: Et per Curiam, if Judgment is given in B. R. in Civil Actions, a Writ of Error will not lie in the same Court, but only for Errors in Fact triable by a Jury; but upon a Judgment in criminal Cases, Error will lie in B. R. whether the Error be in Fact or Law; but it lies also in Parliament.

A Writ of Error in *B.R.* will not lie on a Judgment given in that Court for Error in Law, but for Error in Fact in Civil Cases.

Cases, but 'tis otherwise in criminal

(4.) Adjudged, that where Matter of Fact is insufficiently alledged, in nullo est erratum is a Demurrer; so it is if Matter of Fact is alledged against the Record.

Vent. 252. Where *in nullo est Erratum* is a Demurrer.

(5.) But if Matter of Fact is well set forth with Matter of Law, it is a Demurrer as to the Doubleness, but that must be specially assigned, or otherwise in nullo est erratum pleaded, the Matter of Fact will be confessed, and the Matter in Law referred to the Judgment of the Court.

Where Matter of Fact is well set forth with Matter of Law.

(6.) Where the first Judgment is upon an insimul computassent, or upon an Award, and a Writ of Error is brought; there shall be no Bail within the Statute 3 Jac. 1. cap. 8. because these are not Cases within the Words of that Statute, (viz.) Actions founded on Bills or Obligations for Payment of Money.

Bail, where it shall not be on a Writ of Error.

(7.) But if the first Judgment was in an Action on a Bond for Payment of Money, as W. R. should declare was due to him (the Plaintiff) upon accompt, there he must find Bail on a Writ

of Error brought on a Judgment in such Action; because, tho' this Writ is de jure, yet being generally brought for Delay, the Statute shall be * favourably expounded, and this was an Obligation for Payment of Money; 'tis true, 'tis incertain at first as to the Sum, but reduced to a Certainty before the Action brought. Lev. Mich. 15 Car. 2. Dean and Chapter of St. Paul's versus Capell.

* Yel. 227.

Anonymus.

Where an inferior Court proceeds different from the Courts of Common Law.

(8.) PER Holt Ch. Just. In Courts newly constituted, and which are impowered to proceed in a Method different from the Courts of Common Law, their Judgment is not subject to a Writ of Error; but yet B. R. may examine them by Certiorari or Mandamus.

B. R. may examine their Judgments by *Certiorari*, but not by Writ of Error.

1 Roll. Rep. 264. Where a Writ of Error will not lie in the Exchequer-Chamber.

(9.) Where a Judgment in C. B. is affirmed upon a Writ of Error in B. R. and afterwards a Scire facias is brought on that Judgment, and the Plaintiff obtains Judgment thereon; no Writ of Error lies in the Exchequer-Chamber, because the Record was not in B. R. by Bill, as the Statute requires, but by Writ of Error.

ESCAPE.

Sir William Moor's *Case*. Hill. 2 Annæ, B. R.

Mod. Cases 95. 2 Salk. 626. by the Name of *Parker* v. Sir *W. Moor*. * Cap. 16. *and* 5 Annæ, c. 5. Retaking a Person upon an Escape-Warrant, tho' on a Sunday, is not within the Statute.

(1.) A Prisoner escaped, and was retaken upon a Sunday, by Vertue of a Judge's Warrant, usually called an Escape-Warrant, by Vertue of the Statute 1 Annæ; and it was now moved that he might be discharged, for the Taking him upon a Sunday is within the Statute of * Car. 2. which is very true, if this had been a Taking upon an Original Process, but

'tis a Retaking, in the Nature of a freſh Purſuit, and the Marſhal might retake a Man upon a freſh Purſuit, with, or without a Warrant; and ſuch a Retaking, tho' upon a Sunday, is not within the Statute; and if ſo, he may be retaken by an Eſcape-Warrant upon a Sunday, for the Words of the late Act are general, without any Limitation as to Time; and the Defendant having done a wrongful Act, ought not to be ſuffered to take Advantage of it. Nota, 'Tis held otherwiſe in C. B. and the Barons were divided in the Exchequer.

Williams *verſus* Cray. Paſch. 7 Will. III. B. R.

(2.) AN Executor brought an Action on the Caſe againſt a Sheriff, for a falſe Return of a Fieri facias delivered to him by the Teſtator; after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that this Action would not lie, becauſe it was only a perſonal Tort done to the Teſtator, which moritur cum perſona: Et per Curiam, an Executor cannot have an Action for an Eſcape upon meſne Proceſs, becauſe that is meerly perſonal, but he may for an Eſcape upon a Capias ad ſatisfaciend', or for a falſe Return of a Fieri facias, and this by the Equity of the Statute 4 Ed. 3. becauſe the Right being determined after Judgment, the Tort is more than perſonal.

4 Mod. 403. 1 Salk. 12. Executor brought an Action for a falſe Return of a *Fi. fa.* brought by his Teſtator, and good. 1 Roll. Ab. 913. a. 2 Cro. 247.

Rich *verſus* Doughty. Paſch. 3 Annæ, B. R.

(3.) THE Defendant eſcaped out of Priſon, and was retaken by Vertue of an Eſcape-Warrant upon the Statute 5 Annæ, by a Rabble, without any Officer, as the Statute directs, and was by them brought to the Sheriff, who detained him by Vertue of that Warrant, and upon an Habeas Corpus brought, the Sheriff returned, that Doughty was brought to him by W. R. and others, to him unknown, by Vertue of a Warrant, &c. and that he (the Sheriff) detained him in Cuſtody juxta exigentiam Brevis: Et per Holt Ch. Juſt. this was adjudged an inſufficient Return; 'tis true, the Warrant was good, but being illegally executed, the Sheriff ought not to detain him, for he ſhall not graft a legal Impriſonment upon an illegal one; he ought to receive the Priſoner from no Perſon but an Officer, or from one under that Denomination.

Mod. Caſes 154. Where the Defendant was wrong taken by an Eſcape-Warrant. * 5 Annæ, cap. 5.

Tilden

Tilden *verſus* Palfriman. Mich. 2 Annæ, B. R.

1 Salk. 213, 345. Where a Man is actually in Cuſtody, the Entry of an Action in the *Marſhal's* Book is a good Commencement of the Action.

(4.) THere is a ſhort Note of this Caſe in 1 Salk. 213. and the ſame again, and in the ſame Words ſo. 345. but the Caſe was thus: W. R. being indebted to the Plaintiff upon Bond for 100 l. was arreſted, and afterwards being in the Cuſtody of the Marſhal, he eſcaped, and being retaken upon an Eſcape-Warrant, he was committed to Newgate, and having compounded the Debt for 30 l. paid to the Plaintiff, he was diſcharged from that Action by the Plaintiff, and ſet at Liberty; afterwards H. H. another Creditor finding him at large, arreſted him in another Action, and ſo he was brought to the Marſhal again, who ſuffers him to eſcape the ſecond Time, and afterwards H. H. entered an Action againſt him in the Marſhal's Book, by Remanet in Cuſtodia: Et per Curiam, where a Man is actually in Cuſtody, the Entry of an Action in the Marſhal's Book may be a good Commencement of ſuch Action againſt the Party, becauſe when he is in Cuſtody there is no ſerving of Proceſs upon him; but 'tis otherwiſe where he is at large, as he was in this Caſe, tho' it was by Eſcape, becauſe there you have the Advantage of Proceſs againſt him; but it was not reſolved how long the Marſhal ſhall keep him without a Declaration delivered or Bail filed.

Jones 144. Where freſh Purſuit and Retaking is a good Plea, and where not.

(5.) Caſe, &c. in which the Plaintiff declared, that W. W. was in Execution upon a Judgment, and that the Defendant ſuffered him to eſcape (viz. at D. in Com. H.) the Defendant confeſſed the Judgment, and that the ſaid W. W. was in Execution, and that he eſcaped from him at S. in the County of M. and that he made freſh Suit after him, ante exhibitionem billæ præd. and retook him: Et per Curiam, if the Gaoler retakes a Perſon eſcaping before any Action brought, he is excuſed, but 'tis not ſo if the Action was brought before the Retaking; for he having given the Plaintiff a juſt Cauſe of Action, and that being well commenced, ſhall not be defeated by any ſubſequent Matter: 'Tis like the Caſe of an Action of Waſte, if the Defendant plead he repaired before the Action brought, 'tis a good Plea, but not afterwards.

ESTOPPEL.

Trevivian *verſus* Lawrence. Paſch. 3 Annæ *then argued.*

(1.) SCire facias bought by an Adminiſtrator on a Judgment in Trinity-Term, &c. (whereas the Judgment was of Michaelmas-Term) All the Tertenants, except one, appeared, and pleaded Nul tiel Record, and Judgment was had againſt them upon this Plea to that Scire facias, and Execution awarded, and thereupon the Plaintiff ſued out an Elegit and Extent; and now upon an Ejectment bought at the Trial, it was diſcovered, that there was no ſuch Judgment as recited in the Scire facias, for that was a Judgment in Trinity-Term, whereas the Judgment was of Michaelmas-Term following; thereupon the Jury found all this Matter Specially. And now it was argued, that there being no ſuch Judgment as that recited in the Scire facias, for that was a Judgment of Trinity-Term, whereas the Judgment given in Evidence was of Michaelmas-Term; this muſt be a Failure of the Record, which is very true. But per Holt Ch. Juſt. the Scire facias being returned, and the Defendants having appeared, and pleaded to it Nul tiel Record, and Judgment being given, Quod habetur tale Recordum, 'tis now too late to make this Objection; for the Party is ſo eſtopped, that he can never aver againſt it in the Point tried; even the Iſſue in Tail cannot falſify in a Point tried: And as to Eſtoppels, the Ch. Juſtice held, that an Eſtoppel in Pleading doth not bind the Jury, unleſs it works upon the Intereſt of the Land. That where a Plaintiff declares upon a Demiſe (which really was by Indenture) and the Defendant pleads, Nihil habuit in Tenementis; if the Plaintiff take Iſſue upon that Plea, the Jury, notwithſtanding the Indenture, may find that the Leſſor had nothing in the Tenements tempore dimiſſionis, and give a Verdict for the Defendant; but, if inſtead of Nihil habuit in Tenementis, the Defendant had pleaded Nil debet and Iſſue thereupon, if the Defendant give in Evidence, that the Plaintiff Nil habuit in Tenementis, he (the Plaintiff) may in ſuch Caſe take Advantage of his Indenture, by Way of Eſtoppel, becauſe he could not have that Advantage

1 Salk. 276. Where the Party cannot aver againſt a Point tried.

vantage of it in Pleading, as he might in the other Case; so likewise, if a Mortgagee brings an Ejectment against the Mortgagor, and he pleads Not guilty, the Mortgagor shall never be allowed to give in Evidence a precedent Mortgage, he being estopped as to that Matter. Judgment for the Plaintiff.

Pleddall *versus* Freak. Pasch. 8 Will. III.

Where a Demurrer to a Misnosmer is not good.

(2.) DEBT upon Bond against William Freak; the Defendant pleaded his Name is Walter; the Plaintiff demurred, supposing that the Defendant was estopped by the Record, to say his Name was Walter; but Judgment was given Quod Billa cassetur; for the Plaintiff should have pleaded it.

Holman *versus* Hore.

1 Salk. 275. Where an Estoppel is conclusive.

(3.) THIS Case is reported in 1 Salk. by the Name of Gilman versus Hore, to which may be added (viz.) that some Estoppels are absolutely conclusive, and some by Conclusion give an Interest. The Lessor made a Lease to W. R. for twenty Years, and about a Year afterwards he made another Lease to W. W. for twenty Years; now if there was an Attornment to this second Lease, then it amounts to a Grant of the Reversion of the Lessor; but if no Attornment, then 'tis a Lease by Estoppel: So where a Man makes a Lease to B. for twenty Years, and about a Year afterwards makes another Lease to C. for twenty Years, this is a Lease by Estoppel, and the Rent is payable for the whole Term; but if he enter upon the first Lessee, and then make a Lease to C. who is turned out by B. 'tis no Lease by Estoppel, but only a Future Interest for the last Year.

EVIDENCE. *See* Prohibition. 4.

(1.) IN Ejectment, the Plaintiff gave in Evidence a Counterpart of an old Lease, which he found amongst the Writings of his Grandfather's Title, but there were no Witnesses to this Lease, yet it was allowed good Evidence; for the Deeds about that Time (which was in the Reign of Queen Eliz.) were often without any Witnesses.

1 Lev. 25. Where a Counterpart of an old Lease, without Witness, was allowed as Evidence.

(2.) The Plaintiff could not produce any Letters of Administration, yet to prove himself Administrator he produced the Book of the Spiritual Court, wherein there was an Order entered, that Administration shall be granted to him, and this was allowed to be good Evidence.

1 Lev. 25, 101. An Order, that Administration should be granted, was read as Evidence.

(3.) Upon an Issue joined whether Executor or not, the Plaintiff, to prove himself Executor, produced the Probate of the Will; the Defendant may plead, that the Seal was forged, or that there was a Repeal, or that the Testator had Bona notabilia, but he cannot give in Evidence, that this was not his Will, or that another is Executor, or that the Testator was non Compos; because the Ordinary is Judge of these Things, and his Acts are conclusive, and the Party is estopped to falsify them, as he would do, if this should be admitted to be Evidence.

1 Lev. 235. Probate of a Will given in Evidence, to prove the Plaintiff Executor.

Anonymous. Hill. 8 Will. III. B. C.

(4.) Adjudged, that upon Plene administravit pleaded, the Defendant cannot give in Evidence Payment of Judgments, &c. since the Issue joined, nor since the Writ purchased, because the Issue is, whether Plene Administravit at that Time; but tho' he cannot give such Payment in Evidence, yet he may plead it.

Anonymus. Hill. 8. Will. III. B. R.

(5.) RUled per Holt Ch. Juſt. that upon Non Aſſumpſit pleaded, the Defendant cannot give the Statute of Limitations in Evidence, becauſe the Iſſue is joined in the Præter-Tenſe (viz.) upon what was done, and the Evidence only proves the Effect thereof to be now avoided; but upon Nil debet, the Statute may be given in Evidence, for it proves, there is nothing now owing according to that Iſſue.

Lynch *verſus* Clerke.

Where a Copy of a Fine or Recovery ſhall be Evidence.

(6.) PER Holt Ch. Juſt. The Subſtance of a Deed cannot be proved, but by the Deed itſelf, unleſs 'tis burnt, or loſt, or in the Poſſeſſion of the Plaintiff himſelf; and if ſo, then this Matter, as it happens, muſt be ſworn, and that the Deed was executed; and in this Caſe he ſaid, that a Copy of a Fine or Recovery, is good Evidence, ſo as it be ſworn to be a true Copy and examined; ſo likewiſe an old Deed is good Evidence, without any Witneſs to ſwear that it was executed: That wherever an Original is of a publick Nature, and would be Evidence, if produced, an immediate ſworn Copy thereof will be Evidence, as the Copy of a Bargain and Sale, or of a Deed enrolled, of a Church Regiſter, &c. but where an Original is of a private Nature, a Copy is not Evidence, unleſs the Original is loſt or burnt: He likewiſe ſaid, that if the Plaintiff will read the Defendant's Anſwer in Chancery againſt him in Evidence, the Defendant may likewiſe take Advantage thereof, for all is Evidence, or none.

Hoe *verſus* Nelthrope. Hill. 8 Will. III. B. R.

Where a Copy of a Probate of a Will is Evidence.

(7.) IN this Caſe it was held per Holt Ch. Juſt. that the Copy of a Probate of a Will is good Evidence, where the Will itſelf is of Chattels, for there the Probate is an Original taken by Authority, and of a publick Nature; otherwiſe, where the Will is of Things in the Reality, becauſe in ſuch Caſe the Eccleſiaſtical Courts have no Authority to take Probates, therefore ſuch Probate is but a Copy, and a Copy of it is no more than a Copy of a Copy.

Man *verſus* Cary. Paſch. 9 Will. III.

(8.) THE Queſtion being propoſed in this Caſe to the Juſtices of the Common Pleas, whether the Copy of a Bank-Bill remaining upon the File in the Bank of England, was good Evidence, or not: They all agreed that it was, and that it was like the Copy of an Enrollment of a Pariſh-Regiſter, the Bank being a publick Body eſtabliſhed by Act of Parliament for publick Purpoſes.

Copy of a Bank-Bill upon the File in the Bank of *England* is Evidence.

Anonymus.

(9.) PER Holt Ch. Juſt. where a Perſon is convicted of Perjury upon the Statute, and afterwards pardoned, yet he cannot be a Witneſs, for the Puniſhment is Part of the Judgment appointed by the Statute; but 'tis otherwiſe if the Conviction was at Common Law.

Convicted of Perjury, tho' pardoned, cannot be a Witneſs.

Thruſton *verſus* Slatford. Mich. 12 Will. III.

(10.) IN this Caſe it was held, that a Bill of Exceptions would lie at a Trial at Bar, as well as at the Niſi prius, for the Words of the Statute are, that the Juſtices ſhall ſign it, which Word Juſtices, being in the plural Number, cannot be well underſtood of any other Juſtices than thoſe of the Courts at Weſtminſter: And per Holt Ch. Juſt. where a Judge admits that for Evidence which is not Evidence, there the Party muſt not demur, for if he doth, he admits the Evidence to be good, but denieth the Effects of it, and therefore in ſuch Caſe he muſt bring his Bill of Exceptions; and ſo it is if the Judge will not admit that for Evidence which is Evidence.

1 Salk. 284. Where the Party muſt not demur to the Evidence.

(11.) Adjudged, that where there is Special Matter to avoid the Plaintiff's Action, which the Defendant cannot give in Evidence upon the general Iſſue; in ſuch Caſe he muſt plead it ſpecially, but he needs not where he may give it in Evidence upon the General Iſſue. 2 Vent. 295.

(12.) So where-ever there is a meer Matter of Fact to avoid the Plaintiff's Action, the Defendant may plead the General Iſſue and give it in Evidence; but if that Matter of Fact contains likewiſe Matter of Law, the Defendant may either plead ſpecially or generally, and give the Special Matter in Evidence.

(13.) Adjudged, that where the Iſſue is Payment at the Day and Place, in ſuch Caſe, Payment before the Day, or at any other Place, is good Evidence, for Payment before the Day is Payment at the Day.

(14.) So if the Iſſue is Aſſets at ſuch a Place, 'tis good Evidence to prove Aſſets at another Place; for Aſſets any where is Aſſets every where.

EXCEPTION.

Cudlip *verſus* Rundall. Hill. 3 Will. III. B. R.

4 Mod. 11. That it was an Action on the Caſe. What ſhall not be an Exception out of an Exception.

(1.) COvenant, &c. in which the Plaintiff declared, that he being poſſeſſed of a Meſſuage, demiſed it to the Defendant for ſeven Years, and that he ſo negligently kept his Fire that the Houſe was burnt; upon Non demiſit pleaded, the Jury found a Special Verdict, (viz.) that the Plaintiff demiſed the ſaid Houſe to the Defendant, with all Out-houſes, &c. Except the New Houſe lately built upon the Premiſſes, for the Uſe of the Plaintiff and his Family, and not to be let to any other Perſon whatſoever; and at all Times when the Plaintiff ſhould not dwell there, to be uſed by the Defendant and his Aſſigns: The Queſtion was, what Eſtate or Intereſt the Defendant had in this New Houſe, and adjudged, that he was only Tenant at Will, becauſe the New Houſe was well excepted, which Exception was not avoided by the Words which follow, (viz.) And at all Times to be uſed by the Defendant when the Plaintiff doth not dwell there; for that Sentence doth not enure as an Exception out of an Exception, which ſets the Matter at large, but only as a Declaration of the Plaintiff's Intention in making the Exception, therefore this Action will lie.

Wilson *versus* Armorer.

(2.) DEBT against an Heir, who pleaded, that he had nothing by Descent, &c. The Jury found a Special Verdict, that the Father was seised in Fee, and made a Feoffment to several Uses (Excepting two Closes for his own Life): Adjudged, that these Closes descended to the Heir, because there was no Use limited in the Closes; besides, this Exception being an entire Sentence, and having that Effect which the Law will not admit, because the Whole was before limited in Use, therefore it shall be rejected; 'tis like the Grant of an Advowson excepting the Presentation for the Life of the Grantor, which is wholly void; but 'tis not like a Lease of an House, excepting a Chamber to and for the proper Use of the Lessor, because those are Words which give the Lessor an Authority to dispose of the Chamber at his Will and Pleasure.

1 Vent. 87. 78, 106. Raym. 207. 1 Lev. 287. *See* 1 And. 129. S. P. Exception, where it shall be rejected.

EXCHANGE.

Anonymus.

(1.) PErmutatio Vicina est Emptioni, but Exchanges were the original and natural Way of Commerce, precedent to Buying, for there was no Buying till Money was invented; now, in exchanging, both Parties are Buyers and Sellers, and both equally Warrant; and as this is a natural rather than a civil Contract, so by the Civil Law, upon a bare Agreement to exchange, without a Delivery on both Sides, neither of the Parties could have an Action upon such Agreement, as they may in Cases of selling; but if there was a Delivery on one Side and not of the other, in such Case the Deliverer might have an Action to recover the Thing which he delivered, but he could have no Action to enforce the other to deliver what he agreed to deliver, and which the Deliverer was to have in Lieu of that Thing which he delivered to the other.

(2.) In

Where the Word Exchange is neceſſary in the Conveyance.

(2.) In Exchanges of Land the Word Exchange is neceſſary in the Conveyance, becauſe it imports a Special Warranty in reſpect of the mutual Conſideration of the Lands exchanged; 'tis likewiſe neceſſary, that the Eſtates of both Parties be equal in Title, as if one hath an Eſtate in Fee, the other muſt have the like Eſtate; but 'tis not neceſſary that their Eſtates ſhould be equal in Value.

11 Rep. 80. Moor 665. S. C.

Cro. Eliz. 903. Yel. 8. Moor 665. 4 Rep. 121. Buſtard's *Caſe*.

(3.) Adjudged, that if G. D. exchange five Acres with W. N. and afterwards the ſaid W. N. is evicted of one of thoſe five Acres which he had in Exchange, the Whole is defeated, and W. N. may enter on his own again, & ſic è converſo, if G. D. be evicted of one of his five Acres.

EXECUTION.

Sid. 107.

(1.) THE Plaintiff may take out Execution againſt the Bail, and if they pay Part of the Money, he may diſcharge them, and take Execution againſt the Principal for the reſt, but he cannot proceed againſt the Principal till the Bail are diſcharged.

Mod. 312. Vent. 329.

(2.) Judgment againſt four Defendants, if afterwards three ſurrender themſelves, the Bail is ſtill liable; but if the Plaintiff take three in Execution, the Bail are not liable, becauſe in ſuch Caſe they cannot bring them in.

(3.) Upon a Fi. fa. the Defendant may pay the Money to the Sheriff, and may plead, that it was levied; but if he be in Execution he cannot pay it to the Sheriff and plead it to a new A-

2 Jones 97.

ction of Debt, neither can he pay it to the Sheriff if he is taken upon a Ca. ſa. becauſe he hath no Authority to receive it.

Sid. 184.

(4.) The Plaintiff obtained a Judgment for 2000 l. and bought an Elegit, and levied 400 l. he cannot have any other Execution, but he may have an Action of Debt upon the Judgment for the Reſidue of the Debt, becauſe 'tis not ſatisfied, and the Elegit is only by the Statute as a farther Remedy; and in the principal Caſe, the Extent being only of a Term for Years, the Elegit was executed but as a Fieri facias.

(5.) Where Goods are taken in Execution, the Property of the first Owner ceales by his Seisure. 1 Vent. 53.

(6.) If a Prisoner escapes, who was in Execution, his Creditor may retake him by a Ca. Sa. or bring an Action of Debt on the Judgment, or a Scire facias against him, for he hath still an Interest in the Body, as a Pledge for the Debt. 1 Vent. 269.

(7.) Where a Fi. fa. is delivered to the Sheriff to levy 20 l. and he take an entire Thing in Execution (viz.) an Horse worth 30 l. and sells it for so much, and returns, that he levied the 20 l. he may retain the other 10 l. till the Defendant demands it, for he (the Sheriff) is not bound to look after the Defendant; but if on a Fi. fa. for 20 l. he levy five Oxen, worth each of them 5 l. and sell them for so much, the Defendant may have an Action of Trespass against the Sheriff. Noy 59.

Smallcomb *versus* Buckingham.

(8.) IN this Case it was held, that at Common Law, all the Lands were bound which the Party had at the Time of the Judgment given against him, and the Judgment always related to the first Day of the Term; but now, by the Statute 29 Car. 2. the Judgment binds the Lands (as to Purchasers) from the Time it was signed. 1 Salk. 320. Judgment binds from the Time it was signed.

So at Common Law, the Goods were bound from the Teste of the Execution, tho' that might be antedated, and if the Defendant sold the Goods after the Teste, or died, the Sheriff might levy them; but now, by the aforesaid Statute, they are only bound from the Delivery of the Writ of Execution to the Sheriff, but not absolutely bound in all Cases; for if after the Delivery of the Writ, and before Execution executed, the Defendant becomes Bankrupt, that will hinder the Execution. The Goods are bound from the Delivery of the Writ of Execution to the Sheriff, and not from the Teste.

Anonymus.

(9.) RUled, that where an Extent is upon a Statute-Merchant, there needs no Liberate, for the Sheriff may deliver all in Execution without it; but where an Extent is upon a Statute-Staple, or upon a Recognisance, there must be a Return made of such an Extent, and then a Liberate, before there can be a Delivery in Execution; 'tis for this Reason, that a Statute-Merchant is said to include a Liberate, and that the * Sheriff before the Li- Where there needs no *Liberate* on an Extent. * Hutt. 53.

Liberate upon the Extent, may take his Fees, but not where the Extent is upon a Recognisance.

Anonymus.

Where a Sheriff may be a Trespasser, but the Execution is good.

(10.) Where Judgment is given against one, who is in View of the Court, or in Westinster Hall, it may be executed immediately, and the Party taken or sent for into Court and committed; and it was said, that if a Sheriff execute Process in another County, 'tis erronious and void; so if he execute it in a County Palatine; but if he execute it within a Franchise in a County, or in the Isle of Ely, 'tis good, for being but a Liberty, 'tis still Part of the County; and tho' the Sheriff may be a Trespasser, yet the Execution shall stand good.

EXECUTOR.

2 Lev. 26. (1.) Covenant with the Feoffee, his Heirs and Assignes, that they should quietly enjoy; the Feoffee was evicted and died. Adjudged, that his Executor may bring an Action of Covenant, for the Eviction being made to the Testator, he could not have an Heir or an Assignee to this Land; but his Executor represents his Person, who was damnified by the Breach of this Covenant.

2 Lev. 145. (2.) Debt against Husband and Wife, in which the Plaintiff declared upon a Devastavit against both of them; and upon a Demurrer to this Declaration, it was held ill, because a Feme Covert cannot commit Waste; tho' if she survives her Husband, she shall be chargeable for Waste done by him.

1 Vent. 187. (3.) An Executor may bring Trespass, Quare blada crescentia in vita Testatoris messuit & asportavit; for Corn standing is a Chattel, and the Mowing and Carrying it away, was one entire Act; but if the Cutting was at one Time, and the Carrying away at another Time, then they are distinct Acts, and he must sue for the Carrying away only.

(4.) But an Executor cannot bring Treſpaſs Quare herbam creſcentem in vita Teſtatoris meſſuit & aſportavit, becauſe Graſs growing is Part of the Freehold, and not a Chattel.

(5.) An Executor having Aſſets, may be compelled to redeem a Mortgage, for the Benefit of the Heir at Law; he ſhall be likewiſe compelled to pay a Debt for which the Heir was liable. Hardr. 512.

(6.) In Debt for Rent againſt an Executor, tho' 'tis brought in the Detinue, and the Term expired, he cannot plead a Bond of the Teſtator yet unſatisfied, becauſe the Debt for Rent is of as high a Nature as the Debt upon the Bond: The Defendant cannot wage his Law in either Action, and a Bond given for the Rent would not extinguiſh the Action of Debt, which ariſes upon the firſt Contract. 2 Vent. 184.

Whitehall *verſus* Squire. Paſch. 2 Annæ.

(7.) THE Caſe was, A Man poſſeſſed of a Horſe put it to Paſture to the Defendant, and died Inteſtate; W. R. deſired the Defendant to bury him, and agreed, that he ſhould have the Horſe for his Charges, &c. accordingly the Defendant buried him, and laid out more Money than the Horſe was worth; afterwards W. R. took out Adminiſtration, and now brought an Action of Trover for the Horſe: Two Judges were of Opinion, that the Action would not lie, becauſe the Plaintiff conſented and agreed, that the Defendant ſhould have the Horſe. But Holt Ch. Juſt. held, that the Action would lie, becauſe the Defendant was an Executor de ſon tort; 'tis true, ſuch an Executor is only liable in Reſpect to the Value he hath received, and when he hath paid to that Value, he is no farther liable as to Creditors; but as to the Executors, or to a lawful Adminiſtrator, he is ſtill liable in Reſpect of the Tort, in meddling with what by Law belonged to them, and they may bring Trover againſt him; yet Evidence being given of what he juſtly paid, he may be recouped. 1 Salk. 295. Executor *de ſon Tort* liable to Rightful Executor or Adminiſtrator.

The King verſus Sir Richard Raines. Mich. 12 Will. III. B. R.

1 Salk. 299. *Mandamus* to admit an Executor to prove a Will.

(8) MAndamus to admit an Executor to prove the Will of his Teſtator; the Chancellor returned, that true it was, the Party was Executor, but that he was only Executor in Truſt for ſuch Children of the deceaſed, and that he was very Poor, and abſconded from his Creditors, by Reaſon whereof he (the Chancellor) refuſed to grant Adminiſtration, until the Party ſhould give Security to perform the Will, &c. It was urged to maintain this Return, that there are three Sorts of Executors, (viz.) there is an Executor legitimus, and that is the Ordinary himſelf; there is an Executor datus, and that is where one is appointed by the Ordinary to adminiſter, &c. and he always gives Caution, &c. and there is Executor Teſtamentarius, and that is where one is appointed by the Will of the Teſtator; and that in this laſt Caſe the Ordinary may take Security of him by Caution, as well as they do by Oath. But by Holt Ch. Juſt. where a Man is made Executor, he cannot be ſued to Accompt but only in Reſpect of Creditors and Legatees, for the Reſidue is his own by the Common Law; and ſo it is of an Adminiſtrator, becauſe by the Statute 31 Ed. 3. an Adminiſtrator is put in the ſame State and Condition with an Executor; now, an Executor being properly an Officer, 'tis reaſonable he ſhould take a Promiſſory Oath, becauſe this is of Common Right in all Caſes of Officers; but 'tis not of Common Right to demand collateral Security of them, and the Ordinary cannot put Terms upon him where the Teſtator hath put none, neither can he pronounce him to be no Executor, when the Teſtator hath made him ſo.

Wankford *verſus* Wankford.

1 Salk. 309. Where the Obligee makes the Obligor Executor, 'tis a Releaſe of the Debt.

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(2.) 'Tis otherwise if he had no Assets, because then there is no Person to pay, but only to receive, so that 'tis the having Assets that amounts to Payment. Plowd. 185 b.

(3.) If the Obligor administers to the Obligee, tho' there is Assets, this is no Extinguishment, and yet in that Case the same Person is both to pay and receive; the Reason is, because an Administrator comes in by the Act of the Ordinary, but an Executor (as in the principal Case) by the Act of the Party himself; but yet the Chief Justice held, that if an Administrator shall, out of his own Money, pay a Debt of the Intestate to the Value of a Bond-Debt, which he (the Administrator) owed to the Intestate, this would be a Discharge of the Bond. 8 Rep. 136. *Sir* John Needham's *Case*.

(4.) Where the Obligee dies and his Executrix marries the Obligor, this is no Extinguishment of the Debt; but if a Feme Obligee marry the Obligor, this would extinguish the Debt, because it would be a vain Thing for the Husband to pay Money to the Wife in her own Right, but he might pay it to her as Executrix, because there might be Administration de Bonis non, of that as well as of other Goods, and it might be kept by it self; and if the Husband takes it, tho' it becomes his Goods, yet 'tis a Devastavit. 1 Leon. 320. Moor 236. 1 Inst. 264.

(5.) If the Obligee makes the Obligor Executor, and he administers some Part of the Goods (as in the principal Case) and dies before Probate, the Debt is discharged, and this amounts to a Release, because by his administring he hath accepted to be Executor, and becomes a compleat Executor, and cannot afterwards refuse or waive it; and he may, before Probate, receive, pay, release and maintain any possessory Action, as Trover, or Trespass for Goods of his Testator taken since his Death; and he may, before Probate, avow for Rent due since the Death of his Testator, but not before, and the Right of an Executor is not like that of an Administrator, which is derived from the Ordinary, but 'tis entirely by Vertue of the Will, and the Probate gives him no Right, either to his Office or to an Action, for he may bring an Action before Probate, but an Administrator cannot before Letters of Administration granted; 'tis true, he cannot proceed in such Action before Probate, it being convenient in other respects, but not to give him a Right. Plow. Com. 290. 1 Mod. 213.

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(6.) Where an Executor is made, and he never administers, he may refuse whether he will administer or not; and thereupon

an immediate Adminiſtration ſhall be granted, (viz.) de Bonis W. R. inteſtati; but if once he adminiſters, he cannot afterwards refuſe or waive the Office, and Adminiſtration cannot be committed to another during his Life.

(7.) So likewiſe if he adminiſters and dies before Probate, an immediate Adminiſtration, and not an Adminiſtration de Bonis non ſhall be granted, becauſe he died ante onus ſuper ſe ſuſceptum in the Eccleſiaſtical Court.

(8.) Where an Executor dies after he hath adminiſtred and before Probate, and makes a Will, and W. R. Executor, ſuch Executor can never be Executor to the firſt Teſtator, becauſe he can never prove his Will, for he is not named in the Will of the firſt Teſtator, and no Perſon can prove his Will but he who is named in the Will; but if the firſt Executor had proved the Will, then his Executor would have been Executor to the firſt Teſtator, becauſe the Probate of the Will would have been a Continuance of the firſt Executorſhip.

(9.) Where ſeveral Executors are made, they may all refuſe, but if one adminiſters, the reſt cannot refuſe, but they muſt all be named in Actions brought in the Right of the Teſtator, and notwithſtanding ſuch Refuſal, any of them may releaſe a Debt; and if the refuſing Executor ſurvive thoſe who acted, and Adminiſtration is committed to another, 'tis void: But if ſuch refuſing Executor come into Court and refuſe, in ſuch Caſe Adminiſtration may be committed to another.

Upon the whole Matter, the Executor in the principal Caſe having adminiſtered Part of the Goods, tho' that Executorſhip was determined by his Death, yet he being once Executor by his adminiſtring, that operated as a Releaſe of the Debt; and afterwards he dying before Probate, his Executor cannot be Executor to the firſt Teſtator ſo as to revive this Debt.

Yeoman *verſus* Bradſhaw.

Antea Bills of Exchange 7.

(10.) ADjudged, that a Bill of Exchange ſhall be ſaid to be Bona notabilia where the Debtor is, and not where the Bill is, for 'tis no Specialty in Law; for if an Executor pays Debts upon ſimple Contract, or ſuffers Judgment to paſs againſt him, in ſuch Actions he may plead ſuch Payment or Judgment in Bar to an Action upon a Bill of Exchange; 'tis like an Award in Writing, which is no Chattel where ſuch Award lies; for in Pleading, 'tis never ſaid hic in Curia prolat', which ſhews that 'tis no Specialty.

Fees, Feuds, and Feoffments.

(1.) FEoda: Feuds were originally at Will, and then they were called Munera, afterwards they were for Life, and then they were called Beneficia; and for that Reason the Livings of Clergymen are so called at this Day, and afterwards they were made hereditary, and then they were called Feoda, and in our Law Fee-simple. Rel. Spel. 9.

(2.) When Hugh Caput usurped the Kingdom of France, about the Year 947, to fortify and support himself in such Usurpation, he granted to the Nobility, &c. that whereas till then they enjoyed their Honours for Life, or at Will only, they should from thenceforth hold them to them and their Heirs, which was imitated by William, called the Conqueror, upon his Accession to the Crown of England, for till his Reign Fees or Feuds were not hereditary, but for Life only, or for some determinate Time.

(3.) A Feoffment was originally the Grant of a Feodal Estate or Feud; but now 'tis the Grant of an Estate of Inheritance; and till Feuds and Tenures came in, Charters and Conveyances in Fee-simple were made by these Words Dedi & concessi, without the Words Feoffavi.

(4.) And until the Statute Quia emptores terrarum, the Feoffments were always tenendum of the Feoffor per homagium & servitium, but after that Statute they were made tenendum de capitalibus Dominis feodi, &c.

But now the Way of Pleading a Feoffment is thus, (viz.) That W. R. was seised in Fee of the Place where, &c. and being so seised feoffavit quendam W. W. inter alia per nomina omnium, &c. habend' & tenend' dict' tenementa, &c. præfat' W. W. & hæredibus suis in perpetuum ad solum opus & usum, &c.

Parsons *versus* Petitt.

A Special Verdict in Ejectment found, that there were two Jointenants in Fee, one of them made Livery within the View, (viz.) Go enter and take Possession, but before it was executed she married the Feoffee himself; it was argued, that this Feoffment was void, because there was no actual Entry pursuant to

1 Mod. 91. 2 Lev. 34. 1 Vent. 186. Livery in the View, where good.

to the Livery, and that by the ſubſequent Marriage the Feoffee was ſeiſed in Right of his Wife, and now cannot by his Entry work any Prejudice to her Right; but adjudged that he might enter at any Time, for he had not only an Authority ſo to do, but an Intereſt paſſed by the Livery in View, by which Act the Woman did all which was in her Power to do.

FENCES. *See* Diſtreſs 3.

Pool *verſus* Longvill.

2 Saund. 289. Where the Plaintiff's Cattle eſcape into the Defendant's Cloſe for Want of repairing the Fences, which the Defendant ought to repair, they cannot be diſtrained for the Defendant's Rent unleſs levant and couchant.

(1.) IN Replevin, &c. the Defendant avowed the Taking, &c. for Rent arrear; the Plaintiff replied in Bar, that he the Plaintiff was poſſeſſed of a Cloſe adjoining to the Locus in quo, &c. and that the Defendant, and all thoſe, whoſe Eſtate he had Time out of Mind, had made and repaired the Fences, &c. and that the Fences were not repaired, but for Want thereof his (the Plaintiff's) Cattle eſcaped out of his Cloſe into the Locus in quo, &c. and that the Defendant took them before the Plaintiff had any Notice that they were there; and upon Demurrer to this Replication it was adjudged ill, which Judgment was affirmed upon a Writ of Error in B. R. the Court relying upon the Year-Book 10 H. 7. 21. b. where it is held, that if Cattle eſcape into another Man's Land, and the Lord diſtrain, 'tis not material whether they were levant and couchant, for the Diſtreſs is good; but the Reporter tells us, 'that there is a Difference, where a Lord diſtrains within his Lordſhip, and where a Leſſor diſtrains for Rent arrear, for as to the Lord, 'tis not material whether the Fences are in Repair; but as to the Leſſor, if he is bound to repair the Fences, he muſt take Care his Tenant ſhall do it: Et per * Holt Ch. Juſt. 'Tis fit this Caſe ſhould be better conſidered, for it will be hard to maintain it.

* Mod. Caſes 198.

The King versus *the Inhabitants of* Penrith. Pasch. 1. Will III. B. R.

Inquisition for throwing down Fences in the Night-Time. * Cro. Car. 280,439,580. Jones 307. Sid. 107.

INquisition to the Sheriff to enquire, what Malefactors threw down the Hedges and Fences of Lancelot Simpson, &c. and upon a Return thereof a * Distringas was awarded; it was objected, that there was not fifteen Days between the Teste and Return of the Original, and this was held to be a Fault per Curiam: It was also objected, that a Distringas ought not be awarded upon the Return of the Inquisition, but a Scire facias to shew Cause, &c. but adjudged, that a Scire facias was not necessary; then it was objected, that it doth not appear, that Simpson was Lord of the Manor, or had a Right to these Fences; but it was held, that need not be shewed, for if he had no Right, that ought to be objected on the other Side. And lastly, it was objected, that the Vill ought to have a Year and a Day to indite the Malefactors, and it appears, that this Inquisition was taken within the Year after the Offence committed: Adjudged, that a Year and a Day is not necessary to be allowed, but a convenient Time, and of that the Court may properly judge.

1 Lev. 106. *Rex* v. Inhabitants of *Woodford.* Not material whether thrown down by Night or by Day.

Distringas upon the Statute Westm. 2. against the Inhabitants of the next Vills, for throwing down Inclosures. Two of the Inhabitants of each Vill appear, and plead, that the Inclosures were thrown down in the Day-Time, and not in the Night. Et per Curiam, Whether they were thrown down in the Day or Night 'tis not material, for if the Offenders were not known 'tis within the Statute, which gives the Remedy where the Offenders are not known, and where they are known, the Party hath Remedy by an Action of Trespass.

FINES.

Anonymous. Hill. 12 Will. III. B. R.

(1.) PER Holt Ch. Juſt. at Common Law Fines were levied upon any Original Writ; as upon a Writ of Entry, Writ of Right, &c. as well as upon a Writ of Covenant, and they might be levied for any Thing for which a Præcipe quod reddat or permittat lies; and they are leviable in Counties Palatine by the Statute 38 H. 8. cap. 19. and 2 & 3 Ed. 6. cap. 28.

Clements *verſus* Langham. Paſch. 2 Annæ.

Where the Cogniſor died after the Caption, and before the Return of the Writ of Covenant.

(2.) ERror of a Fine levied in the Court of Common Pleas; the Error aſſigned was, that the Cogniſor died after the Caption, and before the Return of the Writ of Covenant, and for this Reaſon it was reverſed. Sed, &c.

Fine levied by an Infant, who died before ſhe was of Age.
2 Vent. 30.
3 Lev. 36.

(3.) The Husband prevailed with his Wife, being about twenty Years of Age, to levy a Fine of her Inheritance; the Wife died. Et per Curiam, if ſhe had been living and under Age, ſhe might upon a Motion be brought into Court by an Habeas Corpus, and if by Inſpection ſhe be found to be under Age, the Court will ſet aſide the Fine, and puniſh the Commiſſioners, who took the Caption; but at Common Law, there were no ſuch Abuſes, becauſe all Fines were levied in Court; but now ſince the Statute 15 Ed. 2. which gibes the Dedimus, Fines have often been levied by Infants.

1 Vent. 143, 170.

(4.) A Fine of all his Lands in the Pariſh of Blandford, ſhall paſs all his Lands in that Pariſh, tho' in ſeveral Vills, but not out of the Vills, tho' in the Pariſh, &c.

1 Ch. Rep. 278.

(5.) A Fine and Nonclaim bars all Truſts and Equities, where the Equity charges the Land, but where it charges the Perſon in Reſpect of the Land, it will not bar; alſo an Equity or Truſt, created by a Fine, ſhall never be deſtroyed or barred by the ſame Fine.

FORCIBLE

FORCIBLE ENTRY.

The Queen versus Griffith *& al'* Mich 1 Annæ B. R.

(1.) INdictment for a Forcible Entry quashed, for not setting forth, that the Party was seised or disseised, or what Estate he had in the Tenement; for if he had only a Term for Years, then the Entry must be laid into the Freehold of A. in the Possession of W. R. and the Restitution must be accordingly: The Word Seisin is a Term of Art in this Case, it being upon the Statute of H. 6. but the Case in * Popham was upon the Statute † 21 Jac.

Indictment quashed for not setting forth, that he was seised or disseised.

* Poph. 205.
† 21 Jac. cap. 15.

Anonymus.

(2.) AT Common Law, where the Party had a Right he might enter with Force; but by the Statute 15 R. 2. he is restrained from entring with Force, tho' he hath a Right to enter; neither can he enter peaceably, and hold out manu forti per 8 H. 6 cap. 5. nor enter manu forti and hold out manu forti.

Now in these Cases, a Man may either proceed Civilly or Criminally; his civil Remedy is by Writ of Forcible Entry, wherein he shall recover treble Damages and Costs; and this is upon the Statute of H. 6. and to this Writ the Defendant may plead Not guilty, or he may plead any Special Matter, and traverse the Force; and the Plaintiff in his Replication must answer the Special Matter, and not the Traverse, for there shall be no Enquiry of the Force, if the Special Matter is found for the Defendant, and if 'tis found against him, then he is convicted of the Force of Course.

(3.) But the Plaintiff can never recover in this Action, unless he maintain his Writ (viz.) that the Defendant expulit & disseisivit eum; therefore he must have some Estate of Freehold at least, and such an Estate upon which the Defendant could not lawfully enter, otherwise it can be no Desseisin.

(4.) But if W. R. is ſeiſed, and L. R. having good Right to enter, doth accordingly enter manu forti, he might be indicted notwithſtanding his Right, and Reſtitution ſhall be awarded.

The King verſus Bengough. Trin. 11 Will. III.

Upon an Inquiſition taken upon the View by one Juſtice, he cannot deny a Traverſe of the four.

(5.) INquiſition for a Forcible Entry upon the Poſſeſſion of Lanton, was taken upon View by one Juſtice of Peace, and Reſtitution awarded; and now the Attorney-General moved for Reſtitution upon an Affidavit made, that when the Force was found, the Defendant tendred a Traverſe of Not guilty to the Inquiſition, which the Juſtice of Peace refuſed to accept; and per Curiam (except Gould Juſtice) the Juſtice of Peace ſhould have accepted the Traverſe, for the Fact was traverſable, and that the Law was taken to be ſo in this Court during all the Time the Ch. Juſtice Keeling ſat here: 'Tis true, in * Styles 'tis ſaid, that upon an Indictment at Seſſions the Juſtices may accept a Traverſe, but that a Juſtice of Peace, upon an Inquiſition of a Force taken upon his View, cannot accept a Traverſe, becauſe 'tis a Sort of Judgment upon his View; but the Law is taken to be otherwiſe.

* Dyer 122, 359, 360.

1 Vent. 108. (6.) The Indictment was, that W. R. being ſeiſed and poſſeſſed, &c. the Defendant entred; this was adjudged ill for the Incertainty.

1 Vent. 306. (7.) So 'tis where the Indictment was, that W. W. entred and diſſeiſed him; for tho' a Diſſeiſin may imply a Freehold, yet it ought to be expreſſed.

1 Roll. Rep. 406. (8.) Indictment, &c. reciting the Statute 8 H. 6. to be (viz.) If any one be expelled vel diſſeiſed, this was adjudged ill; for the Statute is ſi aliquis expulſus & diſſeiſitus in the Copulative and not in the Disjunctive, ſo the Perſon muſt be both expelled and diſſeiſed.

FORGERY.

The Queen verſus Goddard & al'. Trin. 2 Annæ.

(1.) THere is a ſhort Note of this Caſe in 1 Salk. but the Caſe was as followeth: ſi. It was an Indictment for forging an Aſſignment of a Leaſe, the Indictment was, (viz.) Juratores, &c. ſuper ſacramentum ſuum preſentant quod cum Teſtatum exiſtit per quandam Indenturam quod W. R. dimiſiſſet & conceſſiſſet & per eandem indenturam dimiſit & conceſſit, &c. The Defendant falſo fabricavit quandem aſſignationem ſive ſcriptum, vel indorſamentum in ſcriptis, tenor cujus quidem aſſignationis ſequitur, and then it ſets forth the Aſſignment, in hæc verba; and at the Bottom there was the Mark of the Aſſignor, for he could not write his Name; but no Mark appeared upon the Poſtea: Et per Curiam, the * Quod cum is well enough, for 'tis but an Inducement to the Fact; and when the Indictment comes to charge the Forgery, it charges it in a particular Manner; 'tis true, 'tis otherwiſe in an Action of Treſpaſs, for there Quod cum is only Recital and no poſitive Charge: Et per Holt and Powis, the Words per eandem Indenturam conceſſit were a poſitive Averment of a Leaſe, and had no Relation to the Teſtatum exiſtit, but Powell and Gould contra: And per totam Curiam, the Want of the Mark of the Defendant upon the Poſtea was a fatal Defect, for by the Statute of Frauds, &c. a Leaſe is not aſſignable without a Writing ſigned by the Party: But per Holt Ch. Juſt. If the Indictment had been for forging a Deed of Aſſignment, and the Fact had been ſet forth without any Mark or Signing, that might have been good, becauſe Signing is not neceſſary to a Deed, for in former Times they were only ſealed and not ſigned; but now, ſince the Statute of Frauds, &c. an Aſſignment by Writing, if 'tis no Deed, yet it muſt be ſigned, and this being no more, it ought to have been ſigned, otherwiſe 'tis no Aſſignment: And now the Court being informed, that there was a new Indictment found againſt the Defendant, they would not give Judgment upon theſe Exceptions, but ruled the Defendant ſhould plead to the Signing: And per Holt Ch. Juſt. the Defendant cannot plead over in any Caſe but in Treaſon and Felony, and being found

1 Salk. 342. Indictment for Forgery not good.

* *Poſtea* Indictment 6.

guilty, he could not plead the other Indictment pending in Abatement, but muſt plead auterfoits convict.

The Queen verſus Brown.

Mod. Caſes 87. Indictment for Forgery not quaſhed.

(2.) INdictment for forging a Cocquet pro quinq; Sarcinis lini, Anglice, five Packs of Linen Cloth; and being found guilty, it was moved in Arreſt of Judgment, that the Indictment was ill, becauſe it was incertain how much Cloth there was in thoſe Packs; but adjudged, that 'tis ſufficient to deſcribe the Thing in which 'tis contained: As for Inſtance, * Duas Sarcinas Canapis, Anglice, two Bundles of Hemp.

* 1 Lev. 303. 2 Lev. 125.

The King verſus Marſh.

Information for Forgery compounded.

(3.) ONE Marſh was found guilty of Murder upon the Coroner's Inqueſt, and afterwards the Coroner inſerted the Names of two other Perſons as found guilty by the ſame Inqueſt, who, together with the ſaid Marſh were indicted upon the ſaid Inqueſt, which being tried at Bar, they were all acquitted; afterwards two of the Jury of the Coroner's Inqueſt made Oath, that they found the Indictment only againſt Marſh, and that the Coroner took the Indictment, it being in Engliſh, and told them he muſt engroſs it in Latin, which was done, and then he inſerted the Names of the other two Perſons, whereupon an Information was brought againſt him for a Forgery, which was tried at Bar, and he was found guilty, but having compounded with the Proſecutor, was fined only twenty Nobles.

Watts's *Caſe*.

Hardres 331. Who ſhall not be a Witneſs to an Information for a Forgery.

(4.) INformation againſt the Defendant for Forgery, and for publiſhing a forged Deed, knowing it to be forged: adjudged, upon a Conference with the Judges of B. R. to whom one of the Barons of the Exchequer was ſent, that no Perſon who is or may be a Looſer by the Deed, or who may receive any Benefit or Advantage by the Verdict being found againſt the Defendant, ſhall be a Witneſs.

FOREIGN PLEA.

Cholmly *verſus* Broom. Paſch. 9 Will. III. B. R.

DEBT againſt the Defendant in Cuſtodia Mareſcalli, upon a Bond ſealed and delivered at Cheſter: The Defendant pleaded, that he was an inhabitant in Cheſter, and at the Time of the Action brought lived in Cheſter, &c. The Plaintiff taking this to be a Foreign Plea, and therefore ought to be ſworn, which not being done, he entered Judgment: But it was ſet aſide, for per Curiam, a Plea to the Juriſdiction is no Foreign Plea, nor a Plea of Privilege, nor of Antient Demeſne, which Pleas are never ſworn: A Foreign Plea is where the Defendant by his Plea would remove the Cauſe of Action out of the County where the Plaintiff had laid it; but 'tis no Foreign Plea where the Defendant agrees the Place and County, as the Plaintiff had laid it. 5 Mod. 335.

Sparks *verſus* Wood.

IN an Action of Debt in London, the Defendant moved for a Prohibition, ſuggeſting, that he tendered a Plea in the inferior Court, that the Cauſe of Action did not ariſe within the Juriſdiction of that Court, and offered to make Oath of it, and now would have made Affidavit of the Truth of the Fact, and of his Plea in B. R. Sed per Curiam, Oath ought to be made of the Truth of the Plea in that very Court whoſe Juriſdiction is denied; and it appearing that he tendered ſuch Oath after the Court was up, this Prohibition was denied, for it ought to be done ſedente Curia and in propria perſona. Mod. Caſes 146. In what Court Oath ought to be made.

FRAUD

FRAUD and COVIN.

(1.) By the Statute 13 Eliz. cap. 3. all fraudulent Conveyances as to Creditors are made void, and by the Statute 27 Eliz. cap. 4. they are made void as to Purchasers.

(2.) Now upon the first of these Statutes, if a Man gives his Goods to his Son, yet they are still liable as to his Creditors; but if he gives them to one of his Creditors Bona fide, without any Trust or Covin, they shall not be liable to other Creditors.

(3.) So if a Man is indicted and give away his Goods to prevent a Forfeiture, the King shall have them upon an Attainder or Conviction; otherwise if he sell them to one for a valuable Consideration, who had no Notice of the Indictment.

Vent. 257. (4.) If Tenant for Life commit a Forfeiture, so that by the Entry of him in the Reversion his Creditors may be defeated, this is a fraudulent Conveyance as to them.

Sid. 133. (5.) Upon the Statute 27 Eliz. if a Man levy a Fine to the Use of himself for Life, Remainder to his Son in Tail, and afterwards sells the Fee-simple to W. R. he, as a Purchaser, shall avoid this Conveyance, because it was voluntary, and therefore fraudulent; so it had been if he had settled the Remainder on his Wife, unless there had been a Consideration or precedent Marriage.

(6.) The Father made a Lease for twenty-one Years, in Trust for his Daughter till Marriage; and if she married with his Consent, then to her during the Term, this till Marriage is fraudulent as to a Purchaser, but after Marriage 'tis good, because Marriage is an Advancement to the Daughter, and the Husband was drawn in by this Conveyance to marry her.

2 Lev. 148. (7.) The Husband was a Tradesman, and his Wife was an inheritrix, and he promised her, that if she would join with him in a Sale of her Land, and let him have the Money to pay his Debts, that he would leave her 400 l. about six Months after the Lands were sold, he gave Bond to W. R. to leave his Wife 400 l. adjudged, this is not fraudulent, but good against Creditors.

GAMING.

Smith *versus* Ary. Hill. 2 Annæ.

(1.) INdebitatus Assumpsit, in which the Plaintiff declared, that in Consideration he had promised the Defendant to play and to pay what he lost; the Defendant promised to play, and to pay the Plaintiff what he (the Defendant) lost; Cumq; etiam, that he (the Plaintiff) had won so much Money ad ludum prædict', the Defendant in Consideratione inde promised to pay it: The Court agreed, that here were mutual Promises laid in the first Count, but that an * Indebitatus would not lie upon those Promises; 'tis true, it was insisted for the Plaintiff, that the mutual Promises in the first Count must be understood, as if repeated in the second, because the Play was upon the same Agreement, and the Money was alledged to be won ad ludum prædict'. But per Curiam, the second Count is not the better for the first, for they are separate and distinct from one another, so that the Agreement laid in the one will not go to the other; and if so, then there is nothing to support this Action but the mutual Promises, and Debt will not lie upon a Promise, and consequently an Indebitatus will not; for there must be a Consideration, or a Quid pro quo to support it.

Mod. Cases 128. *Indebitatus Assumpsit* will not lie upon mutual Promises.

*2 Vent. 175. 3 Lev. 118. *contra.* 5 Mod. 13. 1 Lutw. *Whityear* v. *Chancy.* Moor 776.

Rostington's *Case*.

(2.) ONE covenanted, that his Horse should run four Heats with the Horse of W. R. for 30 l. each Heat, which in all amounts to 120 l. Adjudged, that tho' he win every Heat, he can recover no Part of the Money, for tho' they were distinct Wagers, yet the Contract was entire.

1 Vent. 253. 2 Lev. 92. Tho' the Wagers are distinct, the Contract is intire.

Eggleton *versus* Lewin.

INdebitatus Assumpsit for 20 l. won at Cards, there was Judgment by Default, and a Writ of Enquiry executed, &c. and upon a Writ of Error in the Exchequer Chamber; the Error assigned

Indebitatus Assumpsit lies for Money won at Play, &c.

signed was, that a General Indebitatus Assumpsit would not lie for Money won at Play, and the greater Number of the Judges inclined, that it would; But per Holt Ch. Just. and Pollexfen, Ch. Justice of C. B. that it would not, because there must be some meritorious Act, as a Consideration to maintain such Action; it will lie against him who holds the Wager, because the Law implies a Promise, to deliver the Money to the Winner.

GUARDIAN.

(1.) A Guardian is either legitimus, testamentarius, datus, or custumarius.

(2.) He who is a lawful Guardian is so either jure communi, or jure naturali; the first as Guardian in Chivalry, who is so either in Fact or in Right, the other de jure naturali, as Father or Mother.

(3.) A Testamentary Guardian by Common Law; for the Body of the Pupil was to remain with him who was appointed by the Testator, till the Age of 14. but as for his Goods it might be longer, or as long as the Testator appointed; and as to this Matter there are several * Statutes, which you may see in the Margin.

* 32 H. 8.
34 H. 8.
4 & 5 Ph. & Mar.
12 Car. 2.

(4.) Guardianus datus, by the Father in his Life-time, or by the Lord Chancellor after the Death of the Father.

(5.) And lastly, there is a Guardian by Custom, as of Orphans by the Custom of London, and other Cities and Boroughs.

(6.) By the Civil Law, Id quod a tutoribus arrogatur potius justitia quam aliena authoritate firmatur, therefore the Guardian is to educate his Pupil pro facultate patrimonii & dignitate natalium; and this Word Education comprehends Food, Raiment, Lodging, Phisick and Schooling.

(7.) He shall answer for what is lost by his Fraud, Fault, Negligence or Omission, but not for any casual Events, as where a a Thing had been well but for such an Accident.

(8.) He ought to sell all Moveables in a reasonable Time, and turn them into Land or Money, especially if they were bona peritura, for those yield no Profit; yet in some Cases this Rule may fail, as where the Pupil is near being of Age, and may want such Goods.

(9.) He shall pay Interest for Money in his Hands, which he might have put out at Interest, for in such Case he shall be presumed to make use of it himself.

(10.) If 600 l. is due and in Arrear from the Infant's Estate, and the Guardian compounds it for 100 l. the Infant shall have the Benefit of such Composition, and not the Guardian.

(11.) Now as to Guardianus datus, this Case happened; The Father devised the Tuition of his Son, being seven Years of Age, to his Mother in Law, and died; afterwards the Widow married her Servant, and being Poor, the Uncle gets the Possession of the Infant, and sends him beyond Sea, but the Lord Chancellor ordered him to send for and restore the Infant; for where there is a Guardianship by the Common Law, this Court can order and intermeddle, but where by Statute, as in this Case, the Court cannot remove either the Child or Guardian: but we can and will make him give Security not to marry the Infant without the Court is first acquainted with it. Where a Father devises his Child to a Guardian the Chancery cannot interpose. 2 Ch. Rep. 237.

(12.) And as to a Guardian by Custom, as in Copyhold Manors; if the Copyholder has a Son within Age, and die, the Guardianship doth de jure belong to the next of Kin, to whom the Lands cannot descend; but by Custom it may belong to the Lord of the Manor, either to be Guardian himself, or to appoint one. Hutt. 16. Hob. 215. Lutw. 1188.

(13.) The Father in a Copyhold Manor, and being a Copyholder himself, cannot by Vertue of the Statute * 22 Car. 2. appoint a Guardian for his Son, for there may be a Custom to the contrary, and to alter that Custom may be prejudicial to the Lord of the Manor. 3 Lev. 395. 2 Lutw. 1182. * Cap. 24.

(14.) Where an Infant has only a Personal Estate, the Ecclesiastical Court may appoint a Curator or Guardian as to that, and may take Security of such Curator by Bond, for due Per- 2 Lev. 162.

formance of his Truſt; but it hath been a Queſtion, whether ſuch Bond ſhould be taken in the Name of the Ordinary and Commiſſary, or in the Name of the Ordinary only.

Bridget Hide's *Caſe*.

2 Lev. 128. An Infant being in the Cuſtody of her Father in Law, the Court ordered him to enter into a Recogniſance not to ſuffer her to marry, &c.

(15.) BRidget Hide, being the Daughter and Heir of Sir Thomas Hide, and about thirteen Years old, and her Mother having married Sir Robert Viner, and ſhe being dead, the Court was moved for a Habeas Corpus to be directed to Sir Robert Viner, in whoſe Cuſtody ſhe was left, and who had no Right to her, ſo that her Aunt was Guardian at Law; and ſhe being brought into Court, it was ſuggeſted, that he intended to marry her to a great Perſon, but of ſmall Fortune, tho' ſhe was already married to one Mr. Emmerton, by the Conſent of her Mother whilſt living, which Marriage being queſtioned, and the young Child being asked by the Court, whether ſhe was willing to ſtay with her Father-in-Law? ſhe anſwered, that ſhe was; whereupon he was ordered to enter into a Recogniſance of 40000 l. not to let her marry whilſt ſhe was in his Cuſtody, and to permit her Aunt to viſit her.

HEIR.

Killow *verſus* Rowden. Hill. 2 Will. III. B. R.

2 Lev. 286. 3 Mod. 253. Debt brought againſt an Heir, without ſhewing how Heir, good.

(1.) DEBT againſt the Defendant as Heir to his Father, without ſhewing how he was Heir; upon Riens per Deſcent pleaded, the Jury find, that John Rowden, the Father, being ſeiſed in Fee entered into this Bond, for which the Suit was now brought, and afterwards he ſettled his Lands to the Uſe of himſelf for Life, Remainder to his eldeſt Son in Tail, Remainder to his own Right Heirs, and died; after whoſe Death the eldeſt Son entred and died, leaving Iſſue a Son, who alſo died without Iſſue, ſo that the Reverſion (after the Eſtate-tail

being ſpent) came to the ſecond Son of the Obligor, who was now Defendant; and the Queſtion was, whether he had the Eſtate by immediate Deſcent from him, or from his Nephew, who was the only Son of his elder Brother: Et per Curiam, neither the elder Brother or his Son, were ever ſeiſed of the Reverſion, for they were ſeiſed of an Eſtate-tail, and not of the Reverſion expectant upon the Determination of that Eſtate, and if a Formedon had been brought againſt the Defendant he ſhould not in making his Title have mentioned either his * elder Brother or Nephew; and yet they were ſeiſed of the Reverſion to ſome Purpoſes, (viz.) to give, to forfeit, to be in Ward, and to join the Miſe upon the meer Right.

* 1 Inſt. 14. b. Dyer 308. b. 1 Cro. 412.

(2.) In Debt againſt the Heir upon the Bond of his Anceſtor, he cannot plead that W. R. is Executor, and hath Aſſets ſufficient to pay the Debt, becauſe the Plaintiff ought to have the Benefit of his Security, and by Conſequence his Election to charge either Heir or Executor; but in ſuch Caſe the Heir by a Bill in Equity againſt the Executor ſhall be relieved.

3 Lev. 189. Hard. 515. Where an Heir ſhall be relieved againſt an Executor in reſpect of Aſſets.

(3.) Adjudged, that the Heir is never bound without an expreſs Lien and Aſſets, and even then no longer than he hath Aſſets, for he is not bound to keep them till he is charged; but if he hath Aſſets he ought to plead truly and to confeſs them, otherwiſe a Judgment general ſhall be given againſt him de terris propriis, for 'tis now his Debt.

Jones 88. Heir bound no longer than he hath Aſſets.

Redſhaw *verſus* Heſther.

(4.) DEBT againſt the Defendant as Heir upon a Bond of his Anceſtor; upon Riens per Deſcent pleaded, the Plaintiff replied, that he had Lands by Deſcent ante exhibitionem Billæ, unde de debito prædict' ſatisfeciſſe potuit, & petit judicium Curiæ; and upon a Demurrer to this Replication it was objected, that the Plaintiff ought to have concluded to the Country; beſides, the Replication is ill at Common Law, becauſe 'tis, that the Defendant had Lands by Deſcent ante exhibitionem Billæ, which may be true, and yet he might have none at the Time of the Bill exhibited; 'tis likewiſe ill by the * Statute, for that directs, that where the Heir ſells any Lands which were liable to the Debts of his Anceſtor, before any Action brought againſt the Heir, he ſhall be anſwerable for the Value of the Lands ſo ſold, which Value ſhould be tried by a Jury, who, upon finding that ſuch Lands deſcended, are ex Officio to inquire of the Value; therefore the Replication ſhould be, that the Defendant had Lands by Deſcent, before, or at the Time of the original Writ,

5 Mod. 122. Debt againſt an Heir, good.

* 3 & 4 Will. 3.

Writ, &c. without alledging unde de debito ſatisfeciſſe potuit, and then concluding unde petit judicium, &c. becauſe 'tis making the Value Part of his Replication, and putting it upon the Judgment of the Court, when it ought to have been tried by a Jury: Sed per Curiam, the Replication is good, for tho' a Jury may find, that what deſcended to the Heir is not ſufficient to ſatisfy the Debt, and ſo may falſify the Value alledged in the Replication, yet the Plaintiff ſhall recover to the Value of the Land ſold be it what it will.

Osbaſton *verſus* Stanhope.

2 Mod. 50. Debt againſt an Heir, who pleaded, that he had nothing by Deſcent *præter Reverſionem*, not good.

(5.) DEBT againſt an Heir upon a Bond of his Anceſtor; the Defendant pleaded, that he had nothing by Deſcent præter the Reverſion expectant after the Determination of a Leaſe for Years; the Plaintiff replied, that he (the Defendant) had ſufficient Aſſets by Deſcent; and upon a Demurrer it was objected, that this general Replication was ill, for that the Plaintiff ought to have anſwered the Præter: Sed per Curiam, the Præter is immaterial, becauſe the Reverſion which follows is not chargeable, for the Anceſtor had ſettled the Lands upon Truſtees to the Uſe of himſelf for Life, Remainder to the Heirs Males of his Body, Remainder to his own right Heirs, with Power for the Truſtees to make Leaſes, ſo that this was a Leaſe made by them, and if the Reverſion ſhould happen before the Eſtate-tail ſpent, he had ſtill but a Reverſion after an Eſtate-tail.

HERIOT. *See* Suit of Court 3.

Smartle *versus* Penhallow. Hill. 1701. B. R.

(1.) IN a Special Verdict in Ejectment, the Case was, the Custom of a Manor was, that a Copyholder might surrender for three Lives successive, and that an Heriot was due on the Death of every Tenant; a Copyholder surrendered to W. R. for his own Life, and for the Lives of A. B. and C. D. and the Question was, whether this was warranted by the Custom, and adjudged that it was, and that it was no Inconvenience to the Lord of the Manor, for there could be no Occupancy; but Powell Justice doubted, because of the Statute of Bankrupts: Sed per Holt Ch. Just. the Statute makes no Difference, for if the Copyholder becomes Bankrupt, and his Estate is assigned by the Commissioners, the Assignee would have it determinable upon the Life of the Copyholder Bankrupt, and that the Heriot would be then due, but not upon the Death of the Assignee, because it was so originally, and cannot be altered by the Act of the Copyholder himself.

Mod. Cases 63. 1 Salk. 188. Custom, that a Copyholder might surrender for 3 Lives *successive*, and that an Heriot was due on the Death of every Tenant.

Osborne *versus* Sture.

(2.) IN Trespass the Case was, a Lease was made to Dorothy Edgcomb for ninety-nine Years, if she and Margery Upton should so long live, under the yearly Rent of 20 s. and also after the Decease of the said Dorothy and Margery, her or their best Beast in the Name of an Heriot, that the Plaintiff Osborne married Dorothy Edgcomb, and in Right of his Wife was possessed, and that she and the said Margery Upton were dead, and that the Defendant took the Gelding for an Heriot after the Death of Margery, &c. and upon a Special Demurrer it was objected, that an Heriot ought not to be paid, for this being an Heriot-Service reserved on a Lease, is of the same Nature with all other Services reserved on Leases, and that is to be paid whilst

2 Lev. 2 Lutw. 1366. 3 Mod. 230. Heriot-Service, where to be paid.

whilſt the Leaſe is in Being, but here it was determined by the Death of Margery, and there was no Reverſion in the Defendant at that Time; two Judges were of that Opinion, but two more held, that the Defendant had a reverſionary Intereſt in that Inſtant of Time that Margery died, and that the Seiſing the Gelding ſhall relate to that Time.

HIGHWAYS.

What is an Highway and what a private Way.

(1.) ADjudged, that where a Way leads to a Market-Town, or communicates with a great Road, 'tis a Highway, but if it leads to a Church, or to a Vill, or to a particular Houſe, 'tis a private Way, and in an Highway, which is called Via Regia, the King hath only the Paſſage for himſelf and the People; for the Freehold of the Soil is in the Lord of the Manor, or in the Owner of the Land on each Side, and if there are Trees and other Profits there, they belong to him.

Who are to repair Highways and private Ways.

(2.) Now, as to Reparation of each, a private Way is to be repaired of common Right by that Vill or Hamlet where it lies, but a publick Highway is to be repaired by the whole Pariſh, unleſs ſome private Perſon is bound to do it, either by Preſcription, Tenure, or Encroachment.

Leſſee for Years cannot be charged *ratione tenuræ*.

(3. But Leſſee for Years cannot be charged ratione tenuræ, becauſe that goes with the Inheritance.

Cro.Car.306. Where a Highway is turned to another Place, he who turns it muſt keep it in good Repair.

(4.) Where an Highway lies over an open Field, and the Owner of the Field turns the Way to another Part of the Field for his own Convenience, or encloſes the Field for his own Benefit, and leaves a ſufficient Way beſides, he is bound to repair and maintain that Way at his own Charge, and he muſt make it paſſable, tho' it was foundrous before; and if the Way is not ſufficient, any Paſſenger may break down the Encloſure and go over the Land, and juſtify it till a ſufficient Way is made, and in this Caſe the Jury are only to inquire if it is the antient Way, if it is incloſed for the Profit of the Owner of the Soil, and if it is foundrous; and it being proved, that it was impoſſible to make the Way, becauſe of the Soil: Per Curiam, Lex neminem cogit ad impoſſibilia, but in this Caſe the Defendant had

had bound himself to make the Way good by enclosing the Field, and that if he would take away the Enclosure, the Charge would fall upon the Parish. Et per Curiam, tho' he hath made the Way as good as' tis capable of being made, he shall not give that in Evidence in Discharge of the Information, but he may give it in Evidence, in Mitigation of the Fine.

(5.) Information against a Common Carrier, setting forth, that no Waggon ought to carry more than 2000 Weight and that the Defendant used a Waggon with four Wheels, & cum inusitato numero equorum, in which he carried 3000 or 4000 Weight at one Time, by which he spoiled the Highway, leading from Oxford to London (viz.) at Lobb-Lane in the Parish of Hosely; this was adjudged good, tho' it was laid generally at Lobb-Lane, without shewing how many Perches in Length, because the Nusance was alledged, for all the Way leading from Oxford to London, and Lobb-Lane was mentioned only for the Venue; and tho' there was no particular Measure expressed how much of the Way was spoiled, it shall be intended all Loob-Lane was spoiled; likewise, tho' 'tis said, that he went inusitato numero Equorum, without setting forth what Number, yet the Information is good, because it was the excessive Weight which he carried that made the Nusance.

Mich. 17 Car. *Egerly's Case.* Information against a Common Carrier, for overloading his Waggon.

(6.) The Defendant was indicted for stopping the King's Highway in Kensington, without setting forth any Boundaries or Abuttals in the Way, leading from such a Town to such a Town, yet adjudged good, for an Highway shall be intended to go throughout the Kingdom; but 'tis otherwise, if the Indictment had been for stopping a private Way.

Noy 98. Latch 182. 2 Leon pl. 13. Indictment for stopping a Highway, good.

(7.) Upon an Indictment for Stopping a Highway, the Course of the Court is, that the Defendant may be admitted to a Fine upon his Submission, and a Certificate of repairing either before or after Verdict; but if after Verdict, there must be a constat to the Sheriff, that he may return that the Way is repaired, for the Verdict being a Record of Conviction must be answered by Matter of Record.

Raym. 213. The Defendant may be admitted to a Fine after a Verdict on a Certificate that the Way is repaired.

(8.) Indictment against a Parish, for not repairing a Highway; upon Not guilty pleaded, they cannot give in Evidence, that another is bound to repair, for if that be the Case, it must be pleaded; but where a private Person is indicted for not repairing, he may give in Evidence, that another is to repair, because he is not bound of Common Right, as the Parish is.

1 Vent. 256. The Defendant cannot give in Evidence, that another Parish is bound to repair, for it must be pleaded.

HUE

HUE and CRY.

(1.) BEfore the Statute of Winton, the King had a certain Farm or Rent out of each County in England, for keeping Watch and Ward, and by that Statute the Counties were discharged of this Rent, being enjoined to do it themselves.

Noy. 155. Where Notice is to be given of the Robbery.

(2.) The Person robbed ought to give convenient Notice thereof, as soon as he can; and being robbed in the Hundred of A. and not knowing the Confines of that Hundred, he goes into the next Hundred and gives Notice there, 'tis sufficient, for that Hundred ought to make Hue and Cry, and by that Means the other Hundred of A. will know of the Robbery.

The Purchaser of the Lands is liable to the Charges after a Robbery done.

(3.) If after a Robbery a Hundredor sells his Lands, the Purchaser or Lessee is liable, for 'tis a Charge upon the Land itself.

The Person robbed is not bound to pursue Robbers.

(4.) The Party robbed is not bound to pursue the Robbers himself, or to lend his Horse for that Purpose; and if he know any of the Robbers he must enter into a Recognisance to prosecute; but still he has Remedy against the Hundred, if they are not taken.

Sid. 11. Where the Hundred is discharged.

(5.) And if any of them are taken within forty Days after the Robbery, or if they take them before the Plaintiff recovers, the Hundred is discharged.

Of the Oath to be made of the Robbery.

(6.) The Party robbed must make Oath before a Justice of Peace, that he did not know the Robbers, or any of them; this he is enjoined to do by the Statute 27 Eliz. cap. 13. Therefore where an Action was brought on the Statute of Hue and Cry, and upon Not guilty pleaded, the Plaintiff had a Verdict; it was objected in Arrest of Judgment, that no Time was laid of the Examination before a Justice of Peace within twenty Days before the Action brought, which is traversable.

IDEOT. *See* Remainder.

IMPARLANCE.

The Queen versus Rawlins. Mich. 4 Annæ B. R.

Mod. Cases 243. 1 Salk. 367. Imparlance given to another Term.

An Information was filed against Rawlins on the first Day of Michaelmas-Term, on which Day he was bound by Recognisance to appear, and accordingly did appear and prayed an Imparlance. And per Northey Attorney-General, formerly, when the Defendant came in by Habeas Corpus, or upon his Recognisance, he was to plead instanter, that if a Declaration in a Civil Action is delivered the first Day of Michaelmas-Term, or at any Time before Crastin' Animarum, tho' the Defendant is not bound to plead so as to try the Cause that Term, yet he shall plead so as to enter, and that the Defendants ought not to have greater Indulgence on the Crown-side; therefore in this Case he insisted, that the Defendant should imparl only to Crast. Animarum of that Term. Et per Holt Ch. Just. Imparlances may be to a Day certain, or to a Return-Day of the same Term, or from one Term to another; and that it was reasonable in this Case to give the Defendant Leave to imparl not to a Day in the same Term, but to a Day of another Term, because, if a Summons had issued, and Process had been continued, he might have stood out to another Term, but might have been brought in before the End of that Term, and then he must have pleaded Instanter, and so he shall do now in another Term.

Ellis *verſus* Thomas. Hill. 9 Will. III.

Where Imparlance is to be allowed, where not.

IMparlances are allowed in General Actions of Treſpaſs, but not in a Speciſal Clauſum fregit. Et per Holt Ch. Juſt. If it appears upon the Record, that an Imparlance was due and denied, 'tis Error; but then ſuch Error muſt appear on the Record.

No Imparlance is allowed in an Homine Replegiando, or in Aſſiſe, becauſe 'tis feſtinum Remedium, unleſs upon good Cauſe ſhewn.

INDICTMENT. *See* Reſtitution, 3.

The King verſus Knight.

1 Salk. 375. Where the Charge is not direct.

(1.) THE Defendant was indicted, for that he being nuper receptor, &c. did falſly endorſe twenty Exchequer Bills Quaſi receptæ eſſent pro Cuſtumis, &c. in deceptionem, &c. The Judgement was arreſted, for that nuper receptor hath not import, that he was the King's Receiver; then to ſay falſo indorſavit quaſi receptæ eſſent, is no direct Charge of any Thing which is criminal; 'tis true, 'tis ſaid in deceptionem Domini Regis, but that is only Matter of Inference and Concluſion, whereas the Charge continued in every Indictment ought to be ſo certain, that the Defendant may know what anſwer to make, and that the Court may ſet the Fine in Proportion to the Offence; and likewiſe, that if the Defendant ſhould be indicted again for the ſame Fact, he may plead Auterfoits convict; 'tis true, the Jury have found, that the Defendant falſo indorſavit, but that will not fix a Guilt, for they are only to find the Contents of the Indictment; and if that will not amount to a Crime, the Adverb, falſo, will not make it ſo.

Anony-

Anonymus. Trin. 2 Annæ.

(2.) THE Defendant was indicted, Quare vi & armis centum oves, &c. cepit, and a Motion was made to quash it, for that it was no more than an Action of Trespass: But per Curiam, an Indictment will lie for taking Goods forcibly, but then such Taking must be proved to be a Breach of the Peace; and tho' the Goods are the Prosecutor's own Property, yet if he take them in that Manner, he will be guilty. Indictment for taking Goods with Force.

Anonymus. Trin. 7 Will. III.

(3.) INdictment for Scolding was quashed, because it was not said to be ad magnam perturbationem pacis Dominæ Reginæ, nor subditorum, or ligeorum suorum. Indictment for Scolding quashed.

The King versus Holliday.

(4.) THE Caption of an Indictment was proborum & legalium hominum de Com' prædict' qui jurati & onerati super sacramentum suum presentant, quashed, because it did not set forth, that they were onerati, &c. to inquire for the * King and the Body of the County. Indictment quashed. * Postea 19.

The King versus Hemmings *and* Ghent.

(5.) THE Defendants being Overseers of the Poor, were indicted for refusing to accompt, &c. for the Money by them received; and upon a Demurrer to this Indictment it was objected, that it set forth they had collected divers Sums of Money, but did not say how much, and this made the Indictment incertain: But Holt Ch. Just. held, that it was not necessary to set forth how much Money they had received, it being impossible to charge them with every particular Sum, and the Indictment is for refusing to come to an Accompt: But a more material Objection was, that the Indictment set forth, that they & eorum uterq; converted the Money to their own Use; but as to that it was held, that the Cheat of one is the Cheat of the other; but lastly it was objected, that this Indictment would not lie, because another Remedy was provided by * the Statute, and of this the Court doubted. Indictment against Overseers of the Poor, for refusing to accompt. * Postea 15. S. P.

The King verſus Hall. Hill. 7 Will. III.

(6.) THE Defendant was a Conſtable, and he was indicted Quod cum Humfredus Hall, being a Conſtable, had ſeiſed eighty half-Crowns, which were ſuſpected to be clipped, and refuſed to deliver them to a Juſtice of Peace; this was held to be an Offence, but not indictable; beſides, the Fact is laid by Way of Recital * Quod cum, &c. and not poſitively.

* *Antea* Forgery 1.

The King verſus Stonehouſe. Paſch. 8 Will. III.

Indictment for a private Wrong, not good. *Poſtea* 9. S.P.

(7.) INdictment againſt Eliz. Stonehouſe, for that ſhe intending to deprive Henry Bradſhaw of ſeveral Sums of Money did falſly and malitiouſly accuſe him of Felony, and of robbing her; this Indictment was adjudged ill, becauſe it was for a Fact not indictable, it not being laid by Way of Conſpiracy, ſo as to make it a publick Crime; and it being only a private Wrong, the Party hath his Remedy by Action on the Caſe.

The King verſus Bakeſtraw. Paſch. 8 Will. III.

Indictment will not lie at Seſſions for *Uſury*.

(8.) THE Defendant was indicted at the Old Baily for Uſury, and being convicted, he brought a Writ of Error, and the Judgment was reverſed, becauſe the Court of Seſſions had no Juriſdiction in this Matter.

The King verſus Atkinſon.

Indictment for a particular Wrong not good. *Antea* 7. S. P.

(9.) THE Mayor of Newcaſtle, being a Juſtice of Peace, made an Order, that the Company of Tanners there ſhould admit one Young to be a Freeman of that Company: The Defendant Atkinſon, who was Maſter of that Company, and being ſerved with this Order, refuſed to obey it, and for this he was indicted: But per Curiam, 'tis not indictable, for 'tis only a Nonfeaſance and particular Wrong done to another.

The King verſus Savill.

Quaſhed, for that there was no Caption.

(10.) AN Indictment was quaſhed, becauſe there was no Caption to it.

The King verſus Gorge.

(11) THE Defendants were indicted at the Seſſions held in the City of Worceſter, for keeping an open Shop in the ſaid City, not being free thereof, contrary to an immemorial Cuſtom there; quaſhed, for 'tis not a Matter indictable. What is not indictable.

The King verſus Brown.

(12.) THE Juſtices made an Order, that the Defendant ſhould pay Stephen Paine, a Taylor, 7 l. for Work done, which he (the Defendant) refuſing to do, was indicted, but it was quaſhed, for 'tis a Matter not indictable. What is not indictable.

The King verſus Bradford.

(13.) THE Defendant was indicted for not curing the Proſecutor of an ulcerated Throat, as he had agreed and undertaken to do; quaſhed, for 'tis no publick Offence, and no more in Effect than an Action on the Caſe. Indictment quaſhed, for that it was not for a publick Offence.

The Queen verſus Steer & al'. Trin. 3 Annæ.

(14.) THE Defendants were indicted, for that they piſcerunt, &c. & viginti Carpas de Bonis & Catallis of the Proſecutor, did take and carry away: Per Curiam, the Fiſh could not be Bona & Catalla of the Proſecutor, unleſs they were in a Stew-Pond or Trunk, but they might be Piſces ſuos in a cloſe Pond, and this is ratione loci, becauſe they could not ſwim away, but they would not quaſh it upon a Motion. Mod. Caſes 183. Indictment for taking 20 Carps, *de Bonis & Catallis ſuis.*

Anonymus. Mich. 2 Annæ.

(15.) THE Defendant was indicted for Aſſaulting and Beating a Cuſtom-houſe Officer in the Execution of his Office, but this Indictment was quaſhed, becauſe by the Statute 13 & 14 Car. 2. a particular Method of puniſhing Offenders of this Nature is preſcribed, (viz.) By Fine and Impriſonment, by the Juſtices of Peace: And per Curiam, ſo it hath been reſolved by all the Judges at Serjeant's-Inn, in a Caſe between the King and Watſon. Offence not indictable, if another Puniſhment is preſcribed by the Statute. *Antea* 5. S. P. 13 & 14 Car. 2. cap. 11. Par. 6.

The

The Queen verſus Langley. Hill. 2 Annæ.

Mod. Caſes 124. Words ſpoken to a Magiſtrate not in Execution of his Office, not indictable. * 11 Rep. 95. † 3 Cro. 78, 689. Moor 247. 1 Vent. 16.

(16.) THE Defendant was indicted for ſaying to the Mayor of Salisbury: You Mr. Mayor, I care not a Fart for you; and on another Day, for ſaying to him, You are a Rogue and a Raſcal, and upon a Demurrer to this Indictment it was inſiſted for the Defendant, that theſe Words do not appear to be ſpoken of the Mayor in the Execution of his Office, and therefore this Indictment would not lie; he cannot be * impriſoned for ſuch Words, neither can he be † indicted: Holt Ch. Juſt. theſe Words are not indictable, becauſe it doth not appear that the Mayor was in the Execution of his Office, nor that he was a Patent Officer, for it would have altered the Caſe, if it had appeared that he was a Juſtice of Peace by Commiſſion from the Queen, for then he would have been indictable, becauſe the Words would have been an Aſperſion upon the Queen and upon the Government in general by whom he was employed; but here it doth not appear he was a Juſtice of Peace, or if he was, it doth not appear that he was ſo by Commiſſion or Appointment of the Queen, but of the Corporation; 'tis true, if theſe Words had been written as they were ſpoken of the Mayor, an Indictment would have laid, for litera ſcripta manet, and there are many Caſes which prove, that the ſame Words, when * written, are actionable, which are not ſo when ſpoken: Et per totam Curiam, Words which directly tend to the Breach of the Peace are indictable, as where one Man challenges another to fight, and the Commiſſion of Oyer and Terminer, de propalationibus Verborum, is to be underſtood of Words ſpoken againſt the Government, or which amount to a Scandalum Magnatum, &c. But for theſe little Offences contra Bonos mores, the Law has made a proper Proviſion, and that is by requiring Surety of the Peace, or for the Good Behaviour, and by committing the Offender if he refuſe to find ſuch Sureties, or if he ſpeak ſuch Words in Court, they may proceed in a ſummary Way againſt him, by Fining him for a Contempt of the Court, and by committing him till he hath paid the Fine: Caſes cited contra, viz. 1 Cro. 503. 2 Bulſt. 139. 3 Mod. 139.

* 1 Sid. 270. 1 Lev. 139.

The Queen verſus Lane.

Mod. Caſes 128. Indictment for uſing a Trade quaſh'd, becauſe it did not conclude *contra pacem.*

(17.) THE Defendant was indicted on the Statute 5 Eliz. for uſing the Trade of a Barber, not having been Apprentice to it for ſeven Years; and a Motion was made to quaſh it, becauſe it did not conclude contra pacem: But per Holt Ch. Juſt.

Just. There can be no Reason for this Objection, for it would be very hard to make a Barber's Shaving a Man by Consent, to be contra pacem; besides, 'tis laid to be contra formam Statuti, and therefore this Indictment is good. But per Powell Just. and the other Judges, every Act which is contrary to Law is contrary to the Peace, and a Breach of the Peace: Therefore by the other three Judges contra Holt. Ch. Just. this Indictment was quashed.

Anonymus. Trin. 2 Annæ.

(18.) THE Caption of the Indictment was per Sacru'm of the Jury proborum & legalium hominum, &c. jurat' & onerat', without saying impanellat'; and for that Reason it was moved to quash it, but denied per totam Curiam.

Jurat' & onerat', and did not say *impanellat'*, yet good.

The Queen versus Cotesworth. Trin. 3 Annæ.

(19.) THE Defendant was indicted, for abusing Dr. Ratcliff; and it was objected against the Caption, that it was Juratores pro Domina Regina & corpore Com' jurat' & onerat', &c. now it should not be * pro Domina Regina & corpore Com', but pro corpore Com'; but it was disallowed.

Mod. Cases 172. *Pro Domina Regina & corpore Com'.* * *Antea* 4.

The King versus Keate. Hill. 8 Will. III.

(20.) HE was indicted upon the Statute of Stabbing, for that he drew his Sword and stabbed James Wells, he having not first struck, but did not say, having not a Weapon first drawn, and concluded contra formam Statuti: The better Opinion was, that the Indictment should set forth, that the Deceased had not a Weapon first drawn.

5 Mod. 287. Upon the Statute of Stabbing, without saying, having a Weapon first drawn, not good.

The Queen versus Daniel. Hill. 2 Annæ.

(21.) THE Defendant was indicted for enticing an Apprentice to depart from his Master, & seipsum absentare from his Service; it was moved in Arrest of Judgment, that this Indictment was naught, because it did not appear, how long he absented, and there was no Averment, that he did absent; 'tis true, 'tis implied, but 'tis not expressly alledged; and as to the Principal Matter, Holt Ch. Just. held, that the seducing an Apprentice to absent was not indictable, because it doth not affect the Publick. But per Powell Justice, It doth affect the Publick as

Mod. Cases, 99, 182. 1 Salk. 380. Indictment for enticing an Apprentice to absent, will not lie.

as much as the Perſwading a Woman to abſent from her Husband, becauſe it tends to deſtroy the firſt Foundation of Society. But per totam Curiam, This Indictment is naught, for not averring, that the Apprentice did abſent; 'tis true, the Word abſentare cauſavit implies, that he did abſent, but an Indictment muſt not only ſhew the Cauſe, but the Effect which follows the Cauſe. And afterwards in Trinity-Term, it was adjudged, that an Indictment would not lie for ſeducing an Apprentice to leave his Maſter, but only an Action on the Caſe; or if it was a Forcible taking him away, then an Action of Treſpaſs per quod ſervitium amiſit.

The Queen verſus Tracy.

Mod. Caſes 30. Indictment for perſwading a Juſtice of Peace not to take Bail.

(22.) THE Defendant was indicted, for that he procured one Muriell the Proſecutor to be arreſted by a Warrant from a Juſtice of Peace, &c. and perſwaded the Juſtice to refuſe Bail, but did not alledge, that any Bail was offered, and that when Muriell was committed, he (the Defendant) extorted diverſe Sums of Money from him, but did not expreſly alledge, that Muriell was committed, nor what Sum was extorted from him; and for theſe Reaſons this Indictment was quaſhed after Verdict; for it being a complicated Offence, the Defendant muſt be guilty of all or none, but they would not diſchage him without he firſt entred into a Recogniſance to appear to a new Indictment, which he did; and afterwards he was indicted de novo, for that he, together with A. and B. intending to oppreſs Muriell, did in the Pariſh of St. Giles's in the Fields, in the County of Middleſex, procure him to be arreſted pretextu Warranti, and brought him before one Chamberlaine, a Juſtice of Peace in the Pariſh of St. Margaret's in the ſaid County, and intending farther to oppreſs him, perſwaded the Juſtice to refuſe Bail, tho' good Bail was offered, and to commit him; and avers, that he was committed, and that Tracy perſwaded the Gaoler to lay him (the Proſecutor) in Irons, who by that Means extorted 5 l. from him, &c. Upon Not guilty pleaded, the Defendant was found guilty; and now it was objected in Arreſt of Judgment, that here was a Miſ-Trial for the Venire was only from the Pariſh of St. Giles's, whereas the Fact did ariſe from the Pariſh of St. Margaret's, as well as from the Pariſh of St. Giles's. And per Curiam, this is a plain Miſ-Trial, but yet the Defendant hath forfeited his Recogniſance, becauſe he was to try the Cauſe with Effect, that is ſo as the Court may proceed to Judgment; and if Defendants will make ſuch Faults on Purpoſe, their Recogniſances ſhall be eſtreated, or a Scire facias ſhall be brought thereon in this Court; for B. R. may take either Courſe, unleſs the Defendant will enter into a Recogniſance

cognisance, to try it again De novo, which accordingly was done, and the Defendant was tried and found guilty again; and it was insisted for him in Arrest of Judgment, that his Perswading Mr. Chamberlaine the Justice, to refuse Bail, was only Matter of Opinion, and that the Extortion was not by the Defendant, but by the Goaler; so that there was no Offence charged in this Indictment against the Defendant, for the rest is only taking a Man upon a lawful Warrant, which is no Crime. But per Holt Ch. Just. he is guilty even of the Oppression and Extortion committed by the Goaler, because he procured him to be wrongfully put into the Goal; for if W. R. wrongfully imprisoneth W. W. and the Goaler detains him till so much is paid, in such Case, he who was the Prisoner shall have an Action of False Imprisonment against W. R. for imprisoning and detaining him until he paid so much Money; and this is a Taking by W. R. and it must be illegal to use any unlawful Means to oppress another. It was held in this Case, that wherever a Justice of Peace may by Warrant arrest a Person, he hath Authority to Bail, and that before any Indictment found, the Justice may grant a Warrant for apprehending a Man for a Misdemeanour, and bind him to the Peace, or over to the Sessions.

In the Case above mentioned it was held, that where the Defendant is indicted, he cannot send a Plea into the Office, without giving Security to try it at his own Charge; but if he come into Court, he may put in his Plea, and the Court is bound to receive it, but then he must be committed, unless he give Security to try it; and if he chooses to be committed, then the Trial must go on at the Charge of the Prosecutor, but if he give Security, the Trial must be at his own Charge.

The King versus Cross. Hill. 13 Will. B. R.

Indictment for buying stolen Goods, knowing them to be stolen.

(23.) THE Defendant was indicted for buying stolen Goods, knowing them to be stolen; and upon Not guilty pleaded, he was convicted; and it was moved in Arrest of Judgment, that by the Statute the Buyer is made Accessary to the Felony, for which he ought to be indicted, and not for a Misdemeanour or Trespass, as he was in this Case, and so it was adjudged; for per Holt Ch. Just. at Common Law this Offence was more than a Trespass, it was Evidence as an Accessary not present, but after the Fact was done.

The King verſus Summers.

1 Lev. 139. Indictment at the Seſſions, for Writing a ſcandalous Letter.

(24) THE Defendant was indicted at the Seſſions, for Writing a ſcandalous Letter to one Mellith concerning a young Woman, whom he intended to marry: Upon Not guilty pleaded, he was found guilty, and afterwards he brought a Writ of Error, and the Error aſſigned was, that this was a private Letter, for which he was not puniſhable by Way of Indictment; or if an Indictment would lie, yet not before the Juſtices of Peace in their Seſſions. Sed per Curiam, this is an Offence, and indictable before the Juſtices in Seſſions, becauſe it tends to the Breach of the Peace.

Raym. 276. Indictment for Felony, in running away with Goods, &c.

Adjudged, That where a Perſon came to a Seamſtreſs's Shop, and asked her to ſhew him ſome Linen, which ſhe did, and delivered it into his Hands, and then he run away with it, that this is Felony; for tho' the Goods were delivered by the Owner, yet they were never out of her Poſſeſſion, becauſe, tho' the Contract might be begun, by asking and telling the Price, yet it was not perfected, and the ſubſequent Act of his running away doth plainly ſhew his Intention to take the Goods feloniouſly before the Property was altered; for which he was indicted, convicted and executed.

Sid. 254. Raym. 276. Indictment for uſing the Proceſs of the Law to a felonicus Purpoſe.

So where a Man, who had no Manner of a Title to an Houſe, brought an Ejectment, and procured an Affidavit to be filed of the Delivery of the Declaration to the Tenant in Poſſeſſion, and for want of appearing and Pleading, got Judgment at his own Suit and then ſued out an Habere facias Poſſeſſionem, and got a Warrant thereon from the High-Bailiff of Weſtminſter, directed to one of his Bailiffs, who, with the Plaintiff himſelf turned the Defendant out of Poſſeſſion, and ſeiſed all the Goods, and converted them to his own Uſe; this was adjudged Felony, for which he was indicted, convicted and executed, for he made Uſe of the Proceſs of the Law, with a felonious Purpoſe.

In-

Induction and Inſtitution.

(1.) PAtrons did originally fill all Churches by Collation and Livery, as they do now to free Chapels, till this Power was extorted from them by Canons. Seld. Tithes. Ch. 6. Par. 2, Ch. 9. Par. 4.

(2) Where the Archdeacon makes a Mandate for Induction, if 'tis executed by one who is not reſident within the Archdeaconry, yet 'tis good. Noy 134.

(3.) Morgan was admitted and inſtituted to a Benefice, afterwards one Glover was preſented, admitted, inſtituted, and inducted, then Morgan was inducted; then R. R. the King's Preſentee was induced and entered upon Morgan, and Glover entered; and the Queſtion was, whether R. R. or Glover had the better Title: Et per Curiam, Morgan being inſtituted, that was a Plenarty againſt any common Perſon, therefore the Induction of Glover was void, and he had but a meer Poſſeſſion, which was defeated by the Induction of R. R. the King's Preſentee, and likewiſe by the Induction of Morgan, who had the firſt Right, ſo that each of them hath a better Right than Glover, therefore R. R. may maintain an Ejectment againſt him. Inſtitution alone without Induction is a Plenarty againſt a common Perſon. 1 Roll. Rep. 191.

INFANTS.

Anonymus.

(1.) IT was held, that an Infant cannot be a Parſon, Juror, Attorney, Bailiff, or Member of Parliament, but he may be a Mayor, Sheriff, Gaoler, or Steward of a Court, by Deſcent, What Officer he may be, what not.

but not by Purchaſe, unleſs granted to him in Reverſion, or ad exercendum per ſe vel deputatum ſuum.

What Leaſes made by him are void and voidable.

(2.) That his Leaſe which he makes, without reſerving any Rent, is void; if Rent is reſerved, 'tis voidable, and ſo is a Leaſe made to him; but his Leaſe of Eſcament is good.

What Contracts made by him are good, what not.

(3.) That all Contracts for Neceſſaries, and which concern his Perſon, are good, as for Debt, Apparel, Phiſick, or Learning, &c. But 'tis otherwiſe if the Contracts do not concern his Perſon, as if 'tis to repair his Houſe, or to carry on his Trade, neither ſhall his Contract to be an Apprentice bind him, unleſs in London, and there 'tis good by the Cuſtom.

(4) Money borrowed for Neceſſaries binds him, if he apply it accordingly; but if miſapplied, then his Contract is not binding.

(5.) All Acts of Neceſſity bind him, as Preſentations to Benefices, Admittances and Grants of Copyholds, and aſſenting to a Legacy.

(6.) All his Acts which have no Colour of Advantage to him, or which are without any Conſideration, are void, but his Feoffment is only voidable, unleſs Livery is made by Attorney, and then 'tis void.

(7.) A Judgment by Default, after his Appearance per Guardianum, ſhall bind him, but not if he never appear, or if he doth appear in Perſon and make Default.

How he muſt ſue and be ſued.

* Jones 177.

(8.) He cannot anſwer but by Guardian, but he may ſue either by Prochein Amy or by Guardian; and his Suit by Prochein Amy is by * the Statute, and that is where he ſues his Guardian, or where his Guardian will not ſue for him.

(9.) His Acts in Pais, as Feoffment or other Deeds, may be avoided by Plea or Entry, after or before he is of full Age, and ſo may his Deed of Bargain and Sale; but his Acts on Record, as his Fine levied, Recovery ſuffered, or Statute acknowledged, muſt be avoided by Writ of Error or Audita querela during his Nonage.

For what he is puniſhable.

(10.) He is puniſhable for permiſſive Waſte, for Eſcapes, for Perjury, for not coming to Church, for Cheating with falſe Dice, for Batteries, for Slander, &c.

Ellis *verſus* Ellis. Hill. 9 Will. III.

(11.) A Sſumpſit againſt an Executor for Money lent to his Teſtator; the Defendant pleaded, that his Teſtator was an Infant; the Plaintiff replied, that the Money lent was for Neceſſaries, and good; for an Infant is chargeable for Money lent, if 'tis laid out for Neceſſaries, according to his Degree, but all that is at the Peril of the Lender.

5 Mod. 368. *See* 1 Salk. 386. Earle *v.* Peale. He is chargeable for Money lent to buy Neceſſaries.

Williams *verſus* Harriſon. Trin. 3 Will. III.

(12.) ADjudged, that if an Infant accepts a Bill of Exchange, he may plead Infancy upon an Action brought againſt him, becauſe the Cuſtom of Merchants is Part of the Law of the Land; and 'tis not a local Cuſtom, as in London, for an Infant to bind himſelf Apprentice, &c.

He may plead Infancy to the Acceptance of a Bill of Exchange.

Score *verſus* Bowles. Mich. 2 Will. III.

(13.) IN Replevin againſt three, they all made Cogniſance by Attorney, and Judgment being given for the Plaintiff, a Writ of Error was brought in B. R. and the Error aſſigned was, that one of the three Defendants was an Infant, but it was diſallowed; for per Holt Ch. Juſt. this Matter was pleadable in Abatement, and therefore not aſſignable for Error.

Where Infancy is pleadable in Abatement, it ſhall not be aſſigned for Error.

IN-

INFORMATION.

The King verſus Roberts. Paſch. 4 Will. III. B. R.

Information not good for the Incertainty.

(1.) INformation againſt a Common Ferryman, ſetting forth the accuſtomed Rates to be, (viz.) for the Paſſage of a Man and Horſe, one Penny, for a Score of Oxen 7 d. for a Score of Sheep 2 d. &c. and that the Defendant being the Ferryman, from ſuch a Day to ſuch a Day, did take of ſeveral of the King's Subjects, unknown, divers Sums of Money exceeding thoſe antient Rates, (viz.) for the Paſſage of one Man and a Horſe 2 d. for every Score of Oxen 12 d. &c. Upon Not guilty pleaded, the Defendant was found guilty, but * the Judgment was arreſted for the Incertainty as to what the Defendant did take, and of whom, and of how many Perſons, for every Taking was a ſeparate Offence.

3 Bulſt. 317.
2 Cro. 324.
2 Leon. 38.
1 Roll. 80
1 Mod. 188.
Poſtea 6.

The Queen verſus Tayler. Paſch. 2 Annæ, B. R.

Information for ſpeaking treaſonable Words of the Dead.

(2.) INformation againſt the Defendant, ſetting forth, that he on the 30th Day of January, proditorie, ſpoke theſe Words, (viz.) King *Charles* the Firſt was rightly ſerved in having his Head cut off, and it was a Pity that his two Sons, *Charles* and *James* were not ſerved ſo too; in contemptum Gulielmi tertii nuper Regis, legumque ſuarum, & ad malum exemplum omnium aliorum in hujuſmodi caſu delinquentium, ac contra pacem dicti nuper Regis, &c. Upon Not guilty pleaded, the Defendant was found guilty; and it was moved in Arreſt of Judgment, that theſe Words were ſpoken of the Dead, and they are not averred to be ſpoken with an Intention to prejudice the Government, and they are not aggravated by the Word Proditorie, becauſe that is applicable only to Treaſon, which this is not: Sed per Curiam, theſe Words affect the Living, tho' they were ſpoken of the Dead, and they advance a Commonwealth Principle contrary to Law, and therefore there needs no Averment, that they were ſpoken with an Intention to injure the Government, for the Words import a Crime of themſelves, and indanger the Queen and Monarchy; and tho' * the Crime is only a Misdemeanor, yet the

* *See* Cro. Car. Hugh Pines's *Caſe*.

Word Proditorie is proper in this Information, because this Misdemeanour has a Tendency to Treason, and shews a treasonable Intent in the Speaker. He was fined forty Marks, being but a poor Tanner, and to stand twice in the Pillory.

The Queen versus Holford.

(3) INformation against the Defendant for Subornation of Perjury, setting forth, that whereas in Curia Domini Regis coram ipso Rege apud Westm' in Com' Middlesex one Rhodes nuper de D. in Com' Surrey, Datmeal-maker, had impleaded the Defendant Holford, for that whereas he was indebted to the Plaintiff in the Parish of St. Clement's Danes in Com' prædict', and promised to pay, &c. and that, whereas upon an Accompt stated between them, the Defendant was found in Arrear, &c. and promised to pay, &c. and the Defendant pleaded Not guilty; and at the Trial did procure one W. R. to swear, that he was present at the Stating the said Accompt, &c. whereas in truth, he was not present, &c. To this Information the Defendant pleaded Not guilty, and the Cause being tried at the Nisi prius in Middlesex, he was found guilty; and it was moved in Arrest of Judgment, that the Fine would be entire, and therefore, if either of the Assignments was naught, no Judgment could be given; but this Objection was disallowed, and thereupon another Objection was made (viz.) that the Cause of Action being laid in Surrey, it could not be tried in Middlesex, and here the Cause of Action was laid in Surrey; 'tis true, 'tis said, that the Defendant was indebted to the Plaintiff in the Parish of St. Clement's Danes in Com' prædict', which must be in the County of Surrey, because that was the County last named, and therefore it must relate to that County, which is very true (viz.) Ad proximum antecedens fiat relatio; but that Rule hath an Exception (viz.) nisi impediat sententia, as it plainly doth in this Case.

Where a Thing shall relate to the last Antecedent, where not.

The King versus Gall. Hill. 10 Will. III. B. R.

(4.) THE Defendant bought and sold live Cattle in the County of Norfolk, not having kept them so many Weeks as required by the Statute * 5 & 6 Ed. 6. and thereupon an Information was brought against him in B. R. in Middlesex. And per Holt Ch. Just. who said ten Judges had resolved these Points.

1 Salk. 372. Where Prosecutions on Penal Statutes must be in proper Counties. * Cap. 14.

(1.) That the Statute * 21 Jac. 1. did not extend to any Offences created by subsequent Penal Statutes, so that Prosecutions

*Cap. 4.

on such Statutes are not restrained to the proper County; but that Informations upon Penal Statutes made before that Act 21 Jac. 1. must be brought in the proper County where the Fact was done.

* Cap. 4. (2.) That an Action of Debt upon the Statute * 5 Eliz. for using a Trade, not having been Apprentice to it for seven Years, must be brought in the proper County where the Offence was committed, and not in B. R. unless the Fact was done in that County where the King's Bench sits, and then the Action may be brought in Middlesex; and Holt Ch. Just. denied the Case of * Barnes and Hughes to be Law, which is reported in many Books.

* 1 Vent. 8.

Who shall be a Common Informer, and who not.

(5.) Debt upon the Statute 23 H. 6. against the Mayor of Dorchester for a False Return of a Burgess to Parliament, by which Statute 40 l. is given to the King and 40 l. to the Party grieved, and not returned, so as he sue for the same within three Months after the Beginning of the Parliament, or to any other Person, who in Default of him so chosen shall sue for the same: The Person chosen did not sue within the three Months, but the Prosecutor after the three Months, and before the End of one Year next following, sued out a Latitat, but not within a Year after the Offence: The Question was, whether he should be taken to be a Common Informer, and so by the Statute 31 Eliz. ought to bring his Action within a Year after the Offence, which was not done in this Case; for the Latitat was sued within a Year after the End of three Months, in which Time the Party grieved was allowed to bring his Action. The better Opinion was, that he was no Common Informer, because there was no Time limited by the Act when the Prosecutor should bring his Action; he stands now in the Place of him who should have brought his Action within three Months, and he was no Common Informer; if he had brought his Action for the Whole 80 l. tam pro Domino Rege quam pro seipso, he had been within the Statute; the Plaintiff had Judgment. But per Holt Ch. Just. a Latitat cannot be a Commencement of a Suit upon a Penal Law, 4 Mod. 129. Culliford versus Blandford. at the King's Pleasure: This Statute is confirmed by 20 Rich. 2. cap. 1. with an additional Punishment, viz. a Fine to the King upon a Trial at Bar, the Defendant was acquitted. 3 Mod. 117. Sir John Knight's Case.

Antea 1. S. P. (6.) Information against the Defendant for Extortion, setting forth, that there is a Common Passage and Ferry-Boat, for transporting People and Cattle, at such Rates, setting them forth; and that the Defendant being a Common Boatman, did carry

carry at several Times several Persons, and several Score of Sheep, and that during that Time he did extort de quibusdam ignotis, for the Use of the said Boat in transporting, (viz.) pro transportatione cujuslibet equi 2 d. Et pro quibuslibet viginti ovibus 4 d. & sic secundum ratam; after a Verdict for the Informer, it was moved in Arrest of Judgment, that the Information was ill, because 'tis not said from whom he extorted those, but only de quibusdam ignotis, and no particular Time is mentioned when he extorted, nor how many Score of Sheep were carried over. Et per Curiam, every Taking is a several Offence, and if this Information should be good, it may as well be said, that an Indictment for Battery will be good, setting forth, that he beat so many of the King's Subjects between such a Day and such a Day; the Judgment was reversed. 4 Mod. 100. The King v. Roberts.

INHIBITION.

Lunne *versus* Dodson. Pasch. 13 Car. B. R.

The Effects of an Inhibition.

(1.) AN Inhibition is either hominis or juris; 'tis ne visitationem facias, vel aliquam jurisdictionem Ecclesiasticam contentionem vel voluntariam habeas: Thus when an Archbishop visits, he inhibits the Bishop, when a Bishop visits, he inhibits the Archdeacon; and the Reason is to prevent Scandal and Destraction, and this continues till the Relaration of the Inhibition, which is not till the last Parish is visited, and then 'tis entred nulla Parochia restat visitanda, for he may hear of no Faults till he come to the very last Parish.

(2.) Now after such an Inhibition upon a Metropolitical Visitation, if a Lapse happens, the Bishop cannot institute, because his Power is suspended, and therefore the Archbishop is to institute; for 'tis not only Penal in the Bishop so to do, but the

Inſtitution itſelf is void, becauſe 'tis an Act of Juriſdiction from which he was ſuſpended.

(3.) But it may be a Queſtion, in the Caſe of a Collation, whether, if a Lapſe happen the Biſhop may collate, becauſe 'tis a Kind of Title; but the better Opinion is, he cannot, becauſe 'tis not by Way of Intereſt, but by Way of Proviſion for the Cure, and to ſupply the Negligence of the Patron; this appears, becauſe the Patron may preſent at any Time after a Lapſe, and before Collation.

INNUENDO. *See* Libell, 4.

Joinder in Action.

Who may join in an Action.

(1.) ADjudged, That where two or more receive a joint Damage, they may join in an Action; as where two Churchwardens brought a Mandamus to the Official to ſwear them, who refuſed and made a Falſe Return, they may join in a Suit againſt him for ſuch Falſe Return; but where the Damages are ſeveral, the Parties cannot join.

Where the Action muſt be ſeveral, and not joint.

(2.) A. owed 20 l. to B. as Executor, and 10 l. more in his own Right, one Action will not lie againſt him for the whole Money, becauſe there muſt be ſeveral Judgments.

6 Rep. 87. 1 Vent. 223, 366. What Actions may be joined, and what not.

(3.) An Action on the Caſe and an Action of Treſpaſs, or Caſe and Trover, may be joined in one Action, becauſe the Foundation of both are on a Wrong, and Not guilty is a good Plea to the Whole; but Aſſumpſit & Trover cannot be joined, becauſe there muſt be different Pleas.

(4.) Caſe and Trover was brought againſt a Carrier for Money delivered to him, this was adjudged ill after a Verdict, becauſe 'tis not founded on a Wrong alone, but on the Cuſtom of the Realm, and a general Verdict could not be given. Sid. 245.

(5.) The Leſſor made a Leaſe to W. R. who covenanted to repair, afterwards the Leſſor aſſigned one Moiety of the Reverſion to B. and the other Moiety to C. adjudged, that both of them may join in one Action of Covenant againſt W. R. the Leſſee for not repairing, for 'tis no more than a perſonal Action to recover Damages, in which Tenants in Common may join. 1 Lev. 107. Sid. 157. Raym. 80. Where two may join in one Action.

(6.) In Actions perſonal, where a Tort is by Common Law and a Tort by Statute, they cannot be joined; ſo 'tis where a Contract is by Common Law and by Cuſtom. What Actions may be joined, what not.

(7.) But where ſeveral Torts are by Common Law, they may be joined, if perſonal; as for Inſtance, Treſpaſs for ſeveral Treſpaſſes, or Treſpaſs and Caſe.

(8.) So where ſeveral Contracts are by Common Law, as Debt upon ſeveral Bonds; Debt upon a Mutuatus and Judgment, or Debt for Rent and Indebitatus for Money lent; for tho' one Plea will not anſwer both, as in an Action of Debt upon a Judgment and upon a Mutuatus, yet there is the ſame Proceſs and Judgment, but 'tis not ſo in Torts and Contracts, for the Proceſs and Judgment are not the ſame.

Boſon *verſus* Sandford. Hill. 2 Will. III. B. R.

(9.) CASE, &c. in which the Plaintiff declared againſt ſix Defendants, ſetting forth, that he loaded a Ship whereof they were Owners, and that they undertook the Goods ſhould be carried ſafely, but that by their Negligence the ſaid Goods were damnified by freſh Water; upon Not guilty pleaded it appeared at the Trial, that there were more Part-Owners of this Ship than theſe ſix Defendants, and becauſe all the Part-Owners muſt be equally liable, the Action being quaſi ex contractu, the Court held, that the Defendants ſhould take Advantage of it in Evidence; for where the Plaintiff brings an Action on the Caſe, he ought to declare according to the Truth of his Caſe; and if the Jury find a Contract made by more than againſt whom the Plaintiff had declared, 'tis a Variance, and if this had been pleaded in Abatement with a Traverſe, Abſque hoc quod ſuper ſe 3 Lev. 258. 3 Mod. 321. 2 Salk. 440. Where the Action is *quaſi ex contractu* it muſt be brought againſt all.

Aſſumpſit tantum, it had been ill, becauſe 'tis no more than the General Iſſue.

Dalſon *verſus* Tyſon. Trin. 7 Will. III. B. R.

5 Mod. 90. 1 Salk. 10. Vent. 233. *Aſſumpſit* and Trover cannot be joined.

(10.) THE Plaintiff declared againſt a Common Carrier, and one Count was in Aſſumpſit, and the other was in Trover; this was adjudged ill after a Verdict, for the one ſounds in Contract and the other in Tort; the like Caſe is 1 Sid. 244. but ill reported: Et per Holt Ch. Juſt. Tenants in Common may either join or ſever in Debt, but in Avowry they muſt ſever, becauſe it goes to the Realty, therefore if three Tenants in Common diſtrain three Beaſts, each of them muſt avow for one Beaſt.

Jointenants and Tenants in Common. *See* Joinder in Action 10.

The Serjeants Obſervations on this Title are chiefly what was ſaid by *Holt* Ch. Juſt. in *Fiſher* and *Wiggs*'s Caſe herein after mentioned.

What makes a Tenancy in Common and what a Jointenancy. * 1 Roll. 441.

(1.) ſſ. WHere there are two Jointenants for Life, each of them hath an Eſtate for his own Life and for the Life of his Companion; and for that Reaſon, if one of them makes a Leaſe, it ſhall continue not only during the * Life of the Leſſor, but after his Death, during the Life of his Companion; for the Leaſe, which is only derivative, ſhall continue as long as the original Eſtate out of which it was derived.

Jones 55. in *Euſtace*'s Caſe.

(2.) But this ſeems contrary to another Reſolution, where it was held, that he hath only an Eſtate for his own Life, and a Poſ-

Possibility of surviving his Companion to be entituled to his Part; and therefore if he grant over his Estate, that Possibility is gone, and if he die, the Estate of the Grantee shall revert to him in the Reversion.

(3.) Goods, or a Term for Years devised to two equally, makes a Tenancy in Common and not Jointenants, because an equal Benefit is intended to both, which cannot be if all must survive to one; but Lands to two equally makes a Jointenancy, for having them for Life there is no Inequality between them; but a Devise to two equally and to their Heirs makes a Tenancy in Common, because the Word Heirs would be in vain if they were Jointenants. 3 Cro. 697. Dyer 25.

(4.) So a Devise to Two, Part and Part alike, they are Tenants in Common and not Jointenants, for there can be no Parties between Jointenants: * But a Devise to two equally to be divided by W. R. they are not Tenants in Common till after the Division is made. *Gouldf. 183.

(5.) Devise to his two Sons, and to the Heirs of their Bodies, but that his Executors shall enjoy it till they come to their several Ages; the Sons are Jointenants for Life, because the Estate hath several Commencements, for each may enter at his full Age, but not to gain an Estate, but only the Possession and Profits. * 2 Cro. 259. Yel. 183. 1 Bulst. 42.

(6.) * Devise to Two, equally to be divided, and to the Survivor, they are Jointenants by Vertue and Force of the last Word. * Vent. 216.

(7.) * Where a Bond is made to Two, the Obligees are Jointenants, and the Survivor shall have the Bond and the Duty; so of Covenants, Debts, and Contracts at Common Law. * 1 Inst. sect. 282.

(8.) Three were Jointenants of Goods, and two of them brought an Action of Trover, without the other; adjudged, that the Defendant might plead this Matter in Abatement; but if he plead Not guilty, the Plaintiffs shall not be nonsuit, tho' this Matter appears upon Evidence, but shall recover Damages for their two Parts. 2 Vent. 113.

(9.) One Jointenant granted, bargained and sold all his Estate and Interest to the other; adjudged this is a good Conveyance, and shall pass his Moiety to his Companion, for the Word Grant amounts to a Release, Confirmation and Surrender, as well as to a Gift, but then the Party must plead it as a Release, for one Jointe- 1 Vent. 78. 2 Saund. 96.

Jointenant cannot grant to another, therefore he muſt plead quod relaxavit, and not quod conceſſit.

(10.) Two Tenants in Common. W. R. brought Treſpaſs againſt one of them; adjudged, that he may plead in Abatement, that he is Tenant in Common with another, but if he pleads Not guilty, he cannot give it in Evidence.

1 Vent. 214. 2 Lev. 113.

(11.) And yet if one Tenant in Common bring an Action of Treſpaſs againſt another, the Defendant may give it in Evidence; the Law is the ſame between Jointenants.

Noy 157.

(12.) Two Jointenants for Life, one made a Leaſe for ninety-nine Years, to commence after his Death, if the other ſhould ſo long live; the other ſurrendered: Et per Curiam, the Leaſe is good in Point of Creation, and ſhall continue, tho' the Leſſor dies, if the Jointenancy had continued; but that being ſevered by the Surrender of the other, there can be no Survivorſhip, and therefore the Leaſe will determine by the Death of the Leſſor, for his Leaſe as to Survivorſhip depends upon the Continuance of the Jointenancy, which was only a meer Poſſibility, and is now deſtroyed, and by Conſequence the Leaſe is ſo too, and ſo it would have been if they had made Partition; but it had not been ſo if both of them had joined in the Leaſe, and afterwards had made Partition or ſurrendered.

Fiſher *verſus* Wigg. Hill. 12 Will. III.

1 Salk. 391. Surrender to the Uſe of his Children, equally to be divided, and to their Heirs reſpectively, makes a Jointenancy. * Yel. 23. Dyer 10.

(13.) THE Caſe was, ſi. The Father being ſeiſed of a Copyhold of Inheritance, ſurrendered the ſame to the Uſe of his five Children, equally to be divided, and to their Heirs reſpectively; the Queſtion was, whether they were Jointenants or Tenants in Common: And per Gould and Turton Juſtices, they are Tenants in Common, becauſe the laſt diſtributive Words (viz.) and to their Heirs reſpectively, ſhew, that it was the Intent of the Surrenderor it ſhould be ſo, which, in the Caſe of a Copyhold and of an * Uſe ought to be purſued: But per Holt Ch. Juſt. They are Jointenants; as to this Eſtate being Copyhold, that is not to be regarded, for that will no more paſs by improper Words than other Eſtates, and this is not properly an Uſe, for there is no Ceſtui que Uſe in this Caſe, nor any Statute Operation, but the Surrenderees are in from the Lord of the Manor, and the Surrender to the Uſe of ſuch Perſons ſhews only the Intention of ſerving ſuch Eſtates and Limitations, ſo that this Uſe is no more than a Gift to five Children, equally to be divided, and that is a Jointenancy and not a Tenancy in Com-

mon, and for these Reasons following; First, because the Words Equally to be divided, import no more than the precedent Words implied (viz.) that the Children should have all alike, which they cannot have if they are not Jointenants. Secondly, the Words, Equally to be divided, doth not make them Tenants in Common; because, as Tenants in Common they must be seised pro indiviso, as to the Possession, whereas those Words, divide their Tenancy and Possession, and whenever the Estate comes to be divided, they cease to be Tenants in Common; therefore 'tis absurd to say, that those Words create an Estate in Common. And lastly, Jointenancy is favoured in Law, which niether loves Fractions or Divisions of Estates; but if this was a Tenancy in Common, then the Tenements and Tenures would be multiplied, for here would be five Copyhold Estates, and five Fines to the Lord of the Manor, instead of one before.

Pullen *versus* Palmer. Trin. 8 Will. III.

(14.) IN Replevin for taking several Cattle, the Defendant avowed in his own Right, for that W. R. was seised in Fee of, &c. and granted a Rent-Charge to A. B. and C. and ten more, who granted to the Defendant and to twelve more, and that four of the said thirteen are since dead, and nine alive, of whom he is one, and that for one Year's Rent, due at such a Time, he distrained: Upon a Demurrer to this Plea it was objected, that the Defendant ought not only to justify in his own Right, but that he ought likewise to make Conusance as Bailiff to the Rest, who were living: Et per Holt Ch. Just. one Jointenant may distrain, but he cannot avow solely, and therefore this Avowry must abate, because 'tis always upon the Right, and the Right of this Rent is in all of them; and therefore the Court cannot adjudge the Right of the Retorn' Habend' to one alone; for which he (the Defendant) ought to have made Conusance, as Bailiff to the Rest; and this is like a * Repleader, where the Defendant may avow de novo. Tenants in Common may join or sever in Debt, but they must sever in Avowry, for the Reason before mentioned (viz.) because it goes to the Realty; and therefore, if three Tenants in Common distrain thirty Beasts, one of them must avow for ten, the other for ten, and the third for ten more. But per Curiam, * the Husband may distrain for Rent due to his Wife, and avow for it alone, because the Right of the Rent due is in him alone.

5 Mod. 71. 150. One Jointenant may distrain, but cannot avow alone.

* Inst. 146, a.

* 2 Cro. 282.

(15.) The essential Difference between Tenants in Common and Jointenants is, that Tenants in Common hold their Lands either by several Titles or several Rights, but Jointenants hold them

The Difference between Tenants in Common and Jointenants.

them by one Title and by one Right; but there is no Difference between them as to the Poſſeſſion, and the Manner of taking the Profits.

Tenants in Common not compellable to make Partition. Co. Ent. 413.

(16.) Tenants in Common were not compellable at Common Law, before the Statute, to make Partition, no more than Jointenants; and per Holt Ch. Juſt. in ſuing out a Writ of Partition, the Party never ſhews, whether he is a Tenant in Common or Jointenant.

ISSUES JOINED.

2 Lev. 12. Where the Day and Place is made Part of the Iſſue, 'tis not good. *See Poſtea 6.*

(1.) IN Replevin the Defendant avowed for Rent Arrear upon a Leaſe made to him 1. Octob. 11 Regis apud F. The Plaintiff in Bar replies, that the Avowant did not make the Leaſe to him on the ſaid 1. Octob. 11 Regis apud F. in Manner and Form, &c. and upon Demurrer to this Replication, per Curiam, the Day and Place are here made Part of the Iſſue, whereas they are not material, for a Demiſe at any other Time and Place would be ſufficient; he ſhould have replied, non demiſit modo & forma.

3 Lev. 170. In Covenant, &c. where *nil debet* is no good Plea.

(2.) In Covenant upon a Leaſe, the Breach aſſigned was for Non-payment of Rent; the Defendant pleaded nil debet; adjudged upon a Demurrer to be an ill Plea.

1 Vent. 213. There muſt be a Negative and Affirmative, to make an Iſſue.

(3.) The Plaintiff ſued as Adminiſtrator; the Defendant pleaded, that W. R. was Adminiſtrator, and yet alive; the Plaintiff replied, that W. R. was not alive, and concluded to the Countrey; and upon a Demurrer to this Replication, it was adjudged ill, for tho' the Matter is Contradictory, yet there muſt be a Negative and an Affirmative to make an Iſſue.

Raym. 98. Where the Plea, *hoc paratus eſt verificare*, is not good.

(4.) Debt upon Bond conditioned to pay all ſuch Sums as ſhould be expended in ſuch a Matter; the Defendant pleaded Payment, & hoc paratus eſt verificare; the Plaintiff replies Nonpayment, & hoc paratus eſt verificare, and upon a Demurrer to this Replication it was adjudged ill, for he ought to have concluded to the Countrey.

(5.) In Debt upon Bond conditioned to render an Accompt of all such Goods of W. R. as came to his hands; upon Oyer the Defendant pleaded, that no Goods of W. R. came to his hands, and averred his Plea; the Plaintiff replied, that a Silver Bowl of W. R.'s came to his hands, and he likewise aver'd his Replication. Et per Curiam, 'tis well concluded, for the Matter is *new; but if it had been expressed in the Condition, then he ought to have concluded his Replication, & hoc petit quod inquiratur, &c. but here it was out of the Condition, and perhaps the Defendant may have new Matter to rejoin; as, that the Bowl was given to him, &c. But 1 Sid. 341. is denied to be Law.

1 Sand: 112. Where *hoc paratus est verificare* is a good Plea.

* *Postea* 10.

Yates *versus* Herlakenden. 9 Will. III. B. R.

(6.) IN Covenant against an Apprentice; the Breach assigned was, that he (the Defendant) penitus decessit from his Service at such a Time, & abinde continue to such a Time; the Defendant pleaded, that he did not depart from his Service, and continue from it as the Plaintiff had alledged; to which Plea the Plaintiff demurred, because the whole Time being put in Issue, the Defendant ought to have pleaded, he did not continue out of his Service for the Time alledged in the Declaration, nor for any Part thereof.

See Antea, 1. Where the whole Time is put in Issue.

Holt, Ch. Just. In a General Issue, as Waste for cutting twenty Trees, the Defendant must plead, that he did not cut the said twenty trees, nor any of them; but 'tis otherwise in a Collateral Issue; as for Instance, in an Action of Debt, upon a Bond conditioned not to commit Waste, and the Breach assigned, that he did commit Waste in cutting twenty Trees, 'tis sufficient for the Defendant to plead he did not cut twenty Trees modo & forma, as the Plaintiff hath alledged, for in such Case he is only to meet with his Adversary; but upon the Evidence, if it appear that he cut down one Tree, the Plaintiff shall have a Verdict.

3 Cro. 84. Dyer 115. B. 1 Inst. 282.

Hall *versus* Stich. 5 Will. III. B. R.

(7.) IN Ejectment for Lands in the County Palatine of Durham: Upon Not guilty pleaded, the Plaintiff had a Verdict; and upon a Writ of Error brought, the Error assigned was, that there was no Issues joined between the Parties, for the Words super patriam were left out; but per Curiam, here is an Affirmative and a Negative, and that makes an Issue; 'tis true, it

Where the Words *super patriam* were left out the Issue is only informal, there being an Affirmative and Negative before.

it had been better if those Words had been in, but the Omission of them only makes the Issue informal, so they affirmed the Judgment.

Skinner *versus* Kilby. Mich. 1 Will. III. Intratur. Trin. 1 Will. III. Rot. 833.

Where *hoc parat' est verificare* is not good.

(8.) IN Covenant, the Plaintiff assigned a Breach, in Non-payment of Rent; the Defendant pleads, that he paid it, & hoc paratus est verificare; and upon a Demurrer to this Plea, it was adjudged ill, because it was an Affirmative to what went before, for that was a Negative (viz.) in Non-payment of Rent, and therefore the Defendant ought to have concluded to the * Country, for otherwise Pleadings would be Infinite.

* Yelv. 138. Cro.Car. 164.

Allen *versus* Symms. Trin. 6 Will. III. Rot. 299.

Where one Affirmative is in Answer to another, it ought to be averred, and not to conclude to the Countrey.

(9.) INdebitatus Assumpsit against Richard Symms, who pleaded Quod ipse idem Richardus versus quem, &c. is called Richard Symonds, and traversed, that he is called Richard Symms, & hoc, &c. The Plaintiff replied, that the Defendant was called and known as well by one Name as by the other, & hoc paratus est verificare; and upon a Demurrer to this Replication, per Curiam, the Defendant may well enough say, that ipse idem Richardus is called Richard Symms, for he may own his Christian Name, and plead a Misnomer to his Surname.

But in this Case all is discontinued by the Plaintiff's Replication, because he averred his Plea, when he ought to conclude to the Countrey. Sed per Curiam, where one Affirmative comes in Answer to another Affirmative, in such Case it ought to be averred, and not conclude to the Countrey; but 'tis otherwise, where an Affirmative comes in Answer to a precedent Negative; therefore in this Case the Defendant having added a Traverse to his Plea, the Plaintiff ought to have concluded his Replication to Issue (viz.) * to the Countrey; for in Pleas the Traverse is as a Negative, and every general Negative must conclude to the Country: So that in this Case the Misconclusion of the Replication had made a Discontinuance.

* Dyer 353. 2 And. 6. Yelv. 138. Thomp. Ent. 1. No. 4. Rast. Ent. 515, 516.

Loder *verſus* Loder. Mich. 2 Will. III. B. R. Rot. 506.

(10.) DEBT upon Bond againſt an Adminiſtrator cum Teſtamento Annex'; the Defendant prayed Oyer of the Condition, which was, that W. R. ſhould not revoke his Will and pleaded, that the ſaid W. R. did not revoke his Will; the Plaintiff replied, that after the ſaid Will the ſaid W. R. made another Will, and thereby he did revoke the firſt Will, &\hoc paratus eſt verificare; and upon a Demurrer to this Replication it was adjudged, that tho' this is an Affirmative to a precedent Negative in the Plea, yet the Plaintiff needs not conclude to the Country in his Replication, but aver it as he had done, becauſe in the Replication * new Matter was ſuggeſted, and therefore he ought to conclude & hoc paratus eſt verificare.

Where there is an Affirmative to a Negative, yet if the Matter is new, it needs not be concluded to the Country.

Antea 5. S. P.

Watts *verſus* Weſt. Paſch. 12 Will. III.

(11.) ACtion againſt the Mayor for a falſe Return, &c. the Practice was agreed to be, that where the Defendant pleads the General Iſſue and 'tis not entered, he may within four Days of the Term waive that Iſſue and plead ſpecially, and if Sunday happen to be one of the four Days, then Monday ſhall be allowed; ſo likewiſe where the Defendant pleads in Abatement, he may at any Time after waive the Special Matter and plead the General Iſſue, unleſs there is a Rule made for him to plead as he will ſtand by it.

Where there is a Plea in Abatement, or the General Iſſue is pleaded, if not entered, the Defendant may waive it.

Marckar *verſus* Harris. Mich. 4 Will. III.

(12.) IN an Action of Debt for Rent; the Defendant pleaded, that the Plaintiff Nil habuit in tenementis; the Plaintiff replied, that he was poſſeſſed of the Tenements by Vertue of a Leaſe for forty Years, made to him by the Lord Wotton, who had Power to demiſe the ſame; and upon a Demurrer to this Replication it was adjudged good, without ſetting forth the Title, for Nil habuit in Tenementis is the Iſſue, and the Plaintiff may reply, quod ſatis habuit in Tenementis, (viz.) in Fee or Tail, &c. and at the Trial Evidence may be given of any other Eſtate, becauſe the particular Eſtate alledged in the Pleading is only Form, where the Iſſue is Nil habuit in Tenementis.

Where *Nil habuit in Tenementis* is the Iſſue, the Title needs not be ſet forth.

JUDGMENT.

Judgment ſhall have Relation to the firſt Day of the Term.

(1.) A Judgment ſhall have Relation to the firſt Day of the Term, as if it was given on that very Day, unleſs there is a Memorandum to the contrary, as where there is a Continuance of the Cauſe till another Day in the ſame Term, per Holt Ch. Juſt.

2 Lutw. 1352. *The Names of the Suitors ought to be ſet forth. Judgment pleaded in an inferior Court without any Plaint levied, ill.

(2.) In Treſpaſs for Taking a Gelding, the Defendant pleaded, that in ſuch a County-Court, coram * ſectatoribus ejuſdem Curiæ per conſiderationem Curiæ debito modo recuperavit verſus præd' the Plaintiff 41. tam occaſione cujuſdam inſultus & tranſg. eidem defenden' per prædict' the Plaintiff, and ſuch a one his Wife illat', quam pro miſ. & cuſtagiis, &c. and upon a Demurrer to this Plea it was adjudged ill, becauſe here was a Judgment in an inferior Court pleaded without any Plaint levied; and becauſe the Names of the Suitors are not ſet forth, and the Judgment is pleaded as obtained againſt the Husband, when the Action was brought againſt Husband and Wife.

After a Rule to ſign Judgment there muſt be four Days exclusive.

(3.) After a Rule to ſign Judgment, there ought to be four Days before the Judgment is ſign'd, and thoſe four Days are computed excluſive of that Day on which the Rule was made, and of that on which the Judgment was ſigned; and this is becauſe the Party may have a reaſonable Time to bring a Writ of Error, if he think fit ſo to do, but in the Common Pleas they ſtay till the quarto die poſt without any Rule, but that Day is incluſive in that Court.

Judgment cannot be affirmed for Part and reverſed for Part.

(4.) Aſſumpſit upon two ſeveral Promiſes, one was found for the Plaintiff and the other for the Defendant, and Judgment for the Plaintiff as to one, and Nil capiat, &c. as to the other; ſed fit in miſericordia, the Defendant brought a Writ of Error and aſſigned for Error the Omiſſion of the Words eat inde ſine die: Et per Curiam, * the Judgment ſhall be reverſed for the Whole, becauſe it being an entire Thing cannot be reverſed for one Part and affirmed for the other Part.

* *See* 2 Cro. 349. Jacob *v.* Mills. But that Caſe is ſince denied to be Law. Allen 75.

Warrant of Attorney not to be ſigned by a Perſon in Cuſtody, unleſs an Attorney is preſent. *Poſtea* 14.

(5.) Regula. Paſch. 15 Car. 2. B. R. It was ordered by the Court, that an Officer ſhall not take any Warrant to confeſs a Judgment of any Perſon in his Cuſtody, unleſs an Attorney for the Defendant is preſent, and ſubſcribes his Name to ſuch Warrant.

Banbury's *Case*. Hill. 6 Will. III. B. R.

(6.) PER Holt Ch. Juſt. Every Judgment muſt not only be compleat, but alſo formal, therefore if a Quo Warranto is brought againſt the Defendant for uſurping Royal Franchiſes, and the Court ſhould give Judgment that he has no Title, yet unleſs they go on and ſay, quod abinde excludatur, 'tis ill; ſo in Debt upon a Bond, if the Defendant plead auterfoits acquit in an Action upon the ſame Bond, and the Judgment was, that he (the Defendant) ſhould recover Damages, * & eat inde ſine die, this is naught without ſaying further, quod querens nil capiat per Billam, becauſe Diſmiſſion is no Judgment in a Court of Law: And per Holt Ch. Juſt. If Treſpaſs is brought for a Treſpaſs done in Lands belonging to ſuch a Houſe, tho' it appear at the Trial that the Plaintiff had no Title to the Houſe, yet the Court cannot give Judgment to turn him out, becauſe it was not judicially before them.

Every Judgment muſt be both compleat and formal.

* 1 Vent. 27, 39. *See* Jacob *v.* Mills. 2 Cro. 349.

Morrice *verſus* Green. Paſch. 11 Will. III. B. R.

(7.) IN this Caſe it was held, that a Judgment by Nihil dicit is where one is in Court, and required to make anſwer to what is objected againſt him, but he is ſilent and ſays nothing in his Defence.

What is a Judgment by *Nihil dicit*.

(8.) There is likewiſe a Judgment for departing in Deſpite of the Court, and that is where the Party appears, and being to attend that Day, goes out of the Court without Leave of the Court, as in Common Recoveries where the common Vouchee comes in and pleads nul Tort, nul Diſſeiſin, and then the Demandant imparls generally, and not to a Day certain; and for that Reaſon the Vouchee is ſtill obliged to attend the Court, but doth not; then the Entry is, Poſtea eodem die revenit the Demandant, and becauſe the Vouchee is not there but is departed, therefore the Demandant hath Judgment.

Departure in Contempt of the Court.

(9.) And laſtly, There is a Judgment by Default, and that is where the Party hath a Day certain, and is demandable, and being demanded doth not appear, whereupon Judgment is given againſt him by Default; and theſe are diſtinct Judgments, which cannot be uſed the one for the other. See Co. Entr. 269. a. Raſt. Ent. 173. b.

What is a Judgment by Default.

Ano-

Anonymus. Mich. 10 Will. III.

Where Execution ſhall be ſtayed on a Motion, where not.

(10.) UPON a Motion to ſtay Execution on a Judgment, upon Pretence of an Agreement ſince the Judgment entered: Per Holt Ch. Juſt. where the Judgment it ſelf was confeſſed and entered upon Terms, the Court will lay their Hands on it and ſee it perform'd, becauſe 'tis no more than a conditional Judgment at firſt; but where the Judgment is abſolute at firſt, there the Party ſhall be put to his Action upon any ſubſequent Agreement concerning it, or may bring an Audita querela, for the Court will not ſtay Execution upon a Motion; and in this Caſe the Chief Juſtice ſaid, that he did not pretend to diſpence Equity at large, but only by the Conſent of the Parties, upon a Rule of Court.

Kirle *verſus* Clifton. Trin. 1 Will. III. B. R.

Upon a Writ of Error, &c. the Defendant pleaded a Releaſe of Errors, the Judgment ſhall be *Nil capiat per Breve.*

(11.) UPON a Writ of Error in B. R. to reverſe a Judgment in C. B. the Defendant in Error pleaded a Releaſe of Errors, and upon a Demurrer to this Plea, it was doubted what Judgment ſhould be given, for the firſt Judgment being erroneous, the Court could not affirm it: Sed per Curiam, A nil capiat per Breve ſhall be entered.

Weſtern *verſus* Creſwick.

4 Mod. 161. Goods were levied by a *Fi. fa.* and ſold, and afterwards the Judgment was reverſed.

(12.) JUdgment againſt the Defendant in an Action of Debt on a Bond, and upon a Fieri facias directed to the Sheriff he took ſome of the Defendant's Goods and ſold them, afterwards this Judgment was reverſed; and upon a Motion to bring the Money into Court for which they were ſold, or to pay it to the Defendant himſelf, the Court would make no Rule, for the Goods might be ſold for leſs than they were Worth, therefore the Defendant may bring an Action of Treſpaſs, if the Plaintiff doth not agree with him.

Davenant *verſus* Rafter.

No material Difference between Coſts and Damages.

(13.) JUdgment in C. B. by Nil dicit, and upon a Writ of Error in B. R. the Error aſſigned was for Want of an Original; the Defendant in the Writ of Error pleaded a Releaſe of all Errors; the Plaintiff replied, that the Releaſe ſet forth by

the Defendant recited a Judgment obtained by him for 600 l. Debt and Damages, ultra mis' & cuſtagia, and that this Releaſe was of Errors in that Judgment; but the Judgment on which the Writ of Error was now brought, was for 600 l. Debt and Damages only, and therefore this muſt be another Judgment; and if ſo, then the Errors in ſuch Judgment are not releaſed. Sed per Curiam in C. B. if the Judgment is by Confeſſion, 'tis always there entred pro debito & damnis, without any farther Addition; but in B. R. 'tis entred tam pro debito & damnis, quam pro mis' & cuſtagiis; but between Damages and Coſts there is no material Variance, for Damages include Coſts.

Stanfaſt *verſus* Chamberlaine.

(14.) IN Ejectment, the Plaintiff had a Verdict at the Aſſizes; per Curiam, the Judgment ought not to be ſigned till four Days after the Return of the Poſtea, which happened to be on the 6th of May, and on that very Day the Judgment was ſigned, but the Plaintiff did not take out Execution till two Days after the Signing the Judgment, ſo that the Defendant had Time enough either to bring a Writ of Error, or to move in Arreſt of Judgment; yet becauſe it was ſigned on the fourth Day after the Return of the Poſtea, when that Day ought to be Excluſive; it was adjudged to be irregular, and therefore the Judgment was ſet aſide, and the Party had Reſtitution.

5 Mod. 205. *Antea* 5. S. P. Judgment ſigned four Days after the Return of the *Poſtea*.

JURISDICTION.

(1.) THE Juriſdiction of Eccleſiaſtical Courts ariſes either as Incident or Principal; and then 'tis either from the Nature of the Thing, as Cauſes Matrimonial and Teſtamentary, or from the Perſon, as Beating a Clerk, or from the Place, as Scolding in the Churchyard, Cutting Trees there, or contemptuous Words ſpoken in Court.

How the Juriſdiction of Eccleſiaſtical Courts ariſes.

(2.) In ſome Cauſes the Spiritual and Temporal Courts have a concurrent Juriſdiction; as where a Man is entitled to a Penſion by Preſcription, he may ſue for it in either Court.

Where both Courts have a concurrent Juriſdiction.

(3.) Now

1 Saund. 14. 1 Sid. 330. What ſhall not be intended to be out of the Juriſdiction.

(3.) Now as to Pleading a Juriſdiction, it hath been adjudged, that where an Indebitatus Aſſumpſit was brought in Durham pro mercimoniis venditis, without ſaying ibidem, this is good; for a Court of a County Palatine is an original Superior Court, and therefore it ſhall be intended, that the Contract was made within the Juriſdiction, tho' 'tis not ſet forth in the Declaration; for nothing ſhall be intended out of the Juriſdiction of a Superior Court, but what Specially appears to be ſo.

Sid. 342. Where the Cauſe of Action is laid *infra juriſdiction'*.

(4.) So where Matter of Aggravation is not laid to be within the Juriſdiction of any Inferior Court; yet, if the Cauſe of Action be laid to be infra juriſdictionem, 'tis well enough.

Sid. 86, 95. Where Words muſt be laid to be ſpoken *infra juriſdictionem.*

(5.) Caſe for Words per quod ſhe loſt her Marriage, if the Speaking be laid within the Juriſdiction, and not the Loſs of Marriage likewiſe, 'tis ill, becauſe that is the Cauſe of Action; otherwiſe, if the Words had been actionable in themſelves.

Sid. 105 In all *Aſſumpſits* it muſt be *infra juriſdictionem.*

(6.) In all Aſſumpſits the Conſideration muſt be laid to be infra juriſdictionem.

1 Vent. 100. Where an *Aſſumpſit* will not lie for carrying Goods *extra juriſdiction'*.

(7.) An Agreement was made within the Juriſdiction of the Marſhalſea to carry Goods to York, an Aſſumpſit will not lie in that Court, as upon an Agreement to carry Goods to York, becauſe the Carrying is out of the Juriſdiction of that Court; but the Plaintiff may declare generally, that the Defendant being indebted to him for Carriage, he promiſed to pay, ſo nothing will appear to be out of the Juriſdiction.

1 Vent. 73. Caſe for ſuing in Inferior Court.

(8.) Caſe lies againſt the Plaintiff for ſuing him in an Inferior Court, where the Cauſe of Action ariſes out of its Juriſdiction.

JUSTICES of PEACE.

The Queen versus Burnaby. Trin. 3 Annæ.

UPON a Certiorari a Conviction before two Justices for cutting down several Lime-Trees in the * Night-Time, being removed into B. R. the Defendant offered to plead, that he had * a Title to the Trees, but three of the Judges would not admit the Plea; for if the Justices had no Jurisdiction, as they had not, if Property had been the Question before them, then an Action lies against those Justices, and against him who executes their Order; but if they had Jurisdiction, then B. R. hath not Power to question their Judgment, therefore this would be altogether new, and without Precedent. But Holt Ch. Just. held, that St. John's Case was a Precedent; and tho' the Roll could not be found, yet it was and must have been done so in that Case, otherwise the Point could not have come in Question; that 'tis as reasonable to falsify the Proceedings of the Justices by this Plea, as 'tis by Action to be brought against them; that if B. R. confirms this Order, then no Action will lie against him who executes it, because he Acts by the Authority of this Court, and that there could be no Reason for him to give an Authority and aid a Fiat to a Thing which ought not to be done: But this Conviction was set aside for another Reason (viz.) because the Number and Nature of the Trees were not expressed: As to the Objection, that they were so small they could not be numbred; the Answer was, if they cannot be numbered, then it ought to set forth so many Bundles, Faggots or Loads, for the Number or Quantity ought to be certain in this Case, as well as in an Action of Trespass, because that is to be the Measure of the Damages; and if that had been done, then this Conviction would have been a good Plea in Bar to an Action of Trespass for the same Cutting.

1 Salk. 181.
* 27 Eliz. c. 7.
* 3 Cro. 821. 5 Rep. *St. John's Case.* Where Property is in Question, the Justices have no Jurisdiction.

JUSTIFICATION.

Matter of Juſtification cannot be given in Evidence, but where it cannot be pleaded.

1 Saund. 17. Where a Man cannot juſtify a Treſpaſs, unleſs he confeſs it.

(1.) MAtter of Juſtification can never be given in Evidence, but where it cannot be pleaded; therefore in Treſpaſs upon Not guilty pleaded, ſon aſſault demeſne cannot be given in Evidence; but 'tis otherwiſe in an Indictment for Murder, &c.

(2.) In Treſpaſs for entring his Cloſe, treading down his Graſs, and feeding his Cattle there; the Defendant pleads, that W. R. had Common there, and appointed him (the Defendant) to look after his Cattle, and that he enter'd to ſee them, quæ eſt eadem tranſgreſſio, and upon Demurrer to this Plea, it was adjudged ill; for the Defendant juſtified his Entry only, and not the Feeding, and a Man cannot juſtify a Treſpaſs unleſs he confeſs it; but here the Defendant did not confeſs it, therefore the Plea being entire, the Juſtification is bad for the Whole.

1 Saund. 14. The Juſtification muſt go to the whole.

(3.) In Treſpaſs for an Aſſault, Beating, and Wounding, and Evil Entreating; the Defendant as to the Wounding pleads Not guilty, and as to the Reſidue, that being Churchwardens, the Plaintiff ſat in the Church with his Hat on his Head, and they pulled it off, quæ eſt eadem inſult', verberatio & maletractio; this was adjudged no Juſtification, becauſe nothing was ſaid as to the Beating, tamen quære, for Treſpaſs to the Perſon imports a Beating, but it ſeems rather to be an Aſſault.

2 Lutw. 932 Where the Juſtification is repugnant.

(4.) Treſpaſs quare vi & armis he aſſaulted and beat the Plaintiff, and took and impriſoned him; the Defendant as to the Force, Aſſaulting and Beating, pleads Not guilty, as to the Taking and Impriſoning him he juſtifies under a Proceſs to arreſt him: This was adjudged ill, becauſe repugnant, for the Defendant having denied any Aſſault and Battery, afterwards confeſſes it, by juſtifying the Taking.

1 Roll Rep. 331. Juſtification to Part, good.

(5.) Treſpaſs for Beating his Servant per quod ſervitium amiſit; the Defendant juſtifies the Battery, but ſaid nothing as to the Loſs of the Service; and upon a Demurrer to the Plea it was inſiſted, that was the Principal Matter to which the Defendant had not given any Anſwer. Sed per Curiam, the Loſs of the Service is the Conſequence of the Battery, and that being juſtified, is a ſufficient Anſwer to the Reſt.

Swinſted

Swinsted *versus* Smith. Mich. 8 Will. III. B. R.

(6) THIS Case is reported in * 1 Salk. by the Name of Swinstead versus Lyddall. It was an Action of Trespass for an Assault, Battery, and false Imprisonment, and for keeping and detaining the Plaintiff, quousq; he paid the Defendant 11 s. The Defendant justified under an Order of the Court of Conscience, &c. by Vertue whereof he took and imprisoned the Plaintiff, and detained him until he paid 10 s. 4 d. &c. And upon a Demurrer to this Plea it was objected, that it did not answer the Declaration, for that was for detaining the Plaintiff, quousq; he paid 11 s. and the Plea is, that he detained him, quousq; he paid 10 s. 4 d. so where a Man declares in an Action of Trespass for taking eleven Sheep, 'tis no answer to justify the Taking ten of them; so likewise if the Plaintiff declare for falsly imprisoning him for three Days, 'tis no Answer to justify for two Days: But on the other Side it was argued, that the Gist of this Action was for the false Imprisonment, as in Trespass for Taking his Horse and immoderately Riding him; the Defendant justified the Taking by the Plaintiff's Leave, but said nothing to the Riding; and upon a Demurrer that was adjudged a good Plea, because the Gist of the Action was the Taking the Horse, and the immoderate Riding was only an Aggravation of the Trespass, and this was Bringlo and Morris's Case, Hill. 27 & 28 Car. 2. B. R. Et per Holt Ch. Just. in the principal Case; the quousq; is only an Aggravation, for the Action was not brought for Taking the 11 s. but for the false Imprisonment and detaining the Plaintiff quousq; &c. as in Trespass for Taking three Sheep, every Sheep is the Cause of the Action, (viz.) Part of the Cause, and so for imprisoning the Plaintiff for three Days, and therefore the Taking every Sheep and imprisoning for every Part of the Time must be answered; 'tis true, if the Plaintiff had been to pay 10 s. 4 d. only, and that after it was paid, the Defendant detained him till he had paid 8 d. more, that might have been material, but then the Plaintiff should have set forth this Matter in * a Replication; so this was adjudged a good Plea.

* 1 Salk. 408. Justification, where 'tis good for Part.

* Moor 704. 2 Saund. 5. Sid. 472.

Sheppard *versus* Tailour.

(7.) IN Replevin for Taking six Dishes, the Defendant justified under a Judgment in a Court-Baron, and a Levari facias awarded, by Vertue whereof he took the Dishes, and upon a Demurrer to this Plea it was adjudged to be ill, because the Execution upon a Judgment in a Court-Baron ought to be by Distrin-

Justification under a Judgment in a Court-Baron, ill.

gas, and not by Levari facias, unleſs there is a ſpecial Cuſtom to warrant it; beſides, the Defendant ſhould not have begun his Plea with the Judgment, but ſhould have gone on gradually, (viz.) he ſhould have ſhewn that there was a Plaint levied, &c. and taliter proceſſum fuit ſuperinde, that a Judgment was obtained, &c.

Freeman *verſus* Blewitt. Hill. 12 Will. III.

1 Salk. 409. Where any Officer juſtifies under a returnable Writ, he muſt ſhew that the Writ was returned.

(8.) RUled per Holt Ch. Juſt. in this Caſe, to which the Court agreed, that in Treſpaſs, if the Sheriff or other principal Officer juſtifies by Vertue of a Capias or any returnable Writ, he muſt ſhew that the Writ was returned, but not if he juſtifies under a Replevin or an alias Replevin, for theſe are not returnable Writs, but a Pluries Replevin is returnable; for the Writ commands the Sheriff to replevy the Goods, vel cauſam nobis ſignificare, therefore he muſt return the Writ, otherwiſe this Inconvenience might happen, (viz.) that if the Defendant ſhould appear and be Nonſuit (for he is the firſt Actor) the Court would be at a Loſs how to give Judgment, whether pro retorn' habend', or a Capias in Withernam, or a meer Nonſuit.

Searle *verſus* Bunnion.

2 Mod. 70. Where a Man may juſtify on his Poſſeſſion without ſhewing a Title.

* Yel. 75. Cro. Car. 138. 3 Mod. 132. Lutw. 1492.

(9.) IN Treſpaſs, &c. The Defendant pleaded, that he was poſſeſſed of the Locus in quo, &c. and ſo juſtified the Taking the Cattle Damage-feaſant; and upon a Demurrer to this Plea it was objected that it was ill, becauſe 'tis not ſufficient for him to ſay generally, that he was poſſeſſed, &c. for in pleading he ought to ſhew the Commencement of his Term: Sed per Curiam, where Treſpaſs is brought, and the Defendant will juſtify by Vertue of any * particular Eſtate, there he muſt ſhew the Commencement of ſuch Eſtate or Title, but where the Matter of Juſtification is collateral to the Title to the Land, (viz.) where the Title can never come in Queſtion; there ſuch a Juſtification as in the principal Caſe, is good.

LAWS.

(1.) THE Saxon Laws were all unwritten till Ethelred the first Christian King published them in Writing. Rel. Spelm. 8.

(2.) And those Laws had a Mixture of the British Customs, and the Danish Laws had a Mixture of both; but William, called the Conqueror, made a new Model of them, for some he approved, and some he rejected, and added more, of which there was a Copy in Rowland Abby, under this Title, ce's sont leges & les Customes que le Roy William Grantoist a tout le people de Angleterre apres le Conquest de la terre icy, &c. Seld. on Fortescue, Cap. 17. Par. 7.

(3.) Mr. Selden tells us, that the Roman Laws were in Use in Britain, for they had several Colonies here, and each of these Colonies was governed according to the Roman Laws, but compares them to a Ship, which by long and frequent mending hath nothing left of the first Materials of which it was made.

(4.) And as to that Question, when and how began our Common Law, he tells us 'tis a trivial Question, and that it began as the Laws of all other States, (viz.) when there first began to be a State in the Land.

(5.) Laws are divided into Arbitrary or natural Laws, the last of which are essentially just and good, and bind every where and in all Places where they are observed.

(6.) Arbitrary Laws are either concerning such Matter as is in its self morally indifferent, in which Case both the Law and the Matter and subject of it is likewise indifferent, or concerning the natural Law it self, and the regulating thereof.

(7.) Now all arbitrary Laws are founded in Convenience, and depend upon the Authority of the legislative Power which appoints them, and both are for maintaining publick Order.

(8.) Those which are natural Laws are from God, but those which are arbitrary are properly humane and positive Institutions.

(9.) Upon the Whole, we may consider the World as one universal Society, and then that Law by which Nations are governed,

ed, is called Jus gentium, if we consider the World as made up of particular Nations; then the Law which regulates the publick Order and Right of Men is called Jus publicum; and that Law which regulates the private Right of Men is called Jus civile.

LEASE at WILL.

Layton *versus* Feild. Hill. 13 Will. III. B. R.

Lessee at Will cannot determine his Will after a Quarter of a Year commenced, without paying that Quarter's Rent.

(1.) PER Holt Ch. Just. Where a Lease is made at Will, the Lessee, after a Quarter of a Year is commenced, may determine his Will, but then he must pay that Quarter's Rent; and if the Lessor determine his Will after the Commencement of a Quarter, he shall lose his Rent for that Quarter: But if a Lease be made from Year to Year, quamdiu ambabus partibus placuerit, in such Case after a Year is commenced, neither the Lessor or the Lessee can determine their Wills for that Year, because they have willed the Estate certain for so long Time.

Germaine *versus* Orchard. Trin. 6 Will. III.

1 Salk. 346. Lessee for Years grants the Lands to *W. R. habend.* to him and his Executors after the Death of *K. K.* the Lessor and his Wife, his whole Interest passed.

(2.) THE Case was, Lessee for Years of Lands granted the said Lands to W. R. his Executors, Administrators and Assigns, Habendum to him and to his Executors, &c. after the Death of the Grantor and his Wife; adjudged, that by the Grant of the Lands generally, the Grantee is Tenant only at Will to the Grantor, that being Estate enough to satisfy the Grant; for it doth not appear that by a Grant of the Lands the Grantor intended to pass his whole Interest and Term; but this Judgment was reversed in the Exchequer Chamber, and there it was held, that if A is possessed of Black-acre for a Term of Years, and grants it to W. R. (not saying, and to his Executors, nor for what Term and Interest) in such Case W. R. is only Tenant at Will to the Grantor; but if he devise Black-acre

to W. R. the whole Eſtate paſſeth; for if it ſhould be an Eſtate at Will, it would either never begin, or determine as ſoon as it begins.

Anonymus. Paſch. 4 Annæ. B. R.

(3.) PER Curiam obiter, it was held, that a Grant or Authority to come upon my Lands, and to hunt there, is but a Licenſe and no more, but if 'tis to take the Profits, 'tis a Leaſe at Will; ſo if 'tis to take the Profits for a Year, 'tis a Leaſe for a Year, for this paſſes an Intereſt, the other is only an Authority to do particular Acts. Difference where there is an Authority, and where an Intereſt.

LEGACY.

(1.) THE Cogniſance of a Legacy properly belongs to the Spiritual Courts, for ſuch Bequeſts were not good at Common Law, the Rule being poſt mortem tunc tua non ſunt. Legacy is ſueable in Spititual Court.

(2.) But this muſt be underſtood where a Legacy is deviſed generally; but if 'tis payable out of the Land, or out of the Profits of the Land, an Action of the Caſe lies at Common Law, but the uſual Remedy is in Chancery. Sid. 44. Where 'tis payable out of Lands, the Remedy is in Chancery.

(3.) The Teſtator being poſſeſſed of ſeveral Leaſes, deviſed them to his Wife for Life, Remainder to his Son for Life, and he owing ſeveral Debts, the Wife paid as far as the Goods and perſonal Chattels went, and aſſented to the Legacy and died, there being ſeveral Debts ſtill unpaid; then her Executor articles with thoſe Creditors to convey a Leaſe to them, and they exhibit a Bill in Equity againſt the Executor and the Son, to have a Conveyance, and the Lord Keeper Finch decreed a Conveyance; for firſt, an Executor is not bound to pay a Legacy unleſs he hath Security given to refund, if there are Debts; and the Reaſon is, becauſe a Legacy is not due till the Debts are paid, for a Man muſt be Juſt before he is Charitable; and therefore, if a Legacy is paid, it remains ſtill in the Hands of the Legatee as a Legacy; but if the Legatee alien bona fide, the Creditor is defeated, for he had a Title, and the Purchaſer Where an Executor is not bound to pay a Legacy. 1 Ch. Rep. 257.

chaſer ſhall not be prejudiced by this Truſt for Creditors: Now in the Principal Caſe, an Aſſent to a Legacy will not do any more than an actual Payment would have done.

1 Ch. Rep. 198. (4.) A Sum of Money deviſed to W. R. to be diſpoſed as the Teſtator ſhould appoint by a Private Note; now if there was no ſuch Note or Appointment, then 'tis a Legacy to W. R. himſelf.

Moor 713. (5.) Legatee of a Term muſt not plead, that it was deviſed to him, and that he entred, but that he entred by Aſſent of the Executor, or Virtute Legationis.

LIBEL.

The King verſus Alme & Nott. Trin. 11 Will. III. B. R.

What ſhall make a Libel, what not. (1.) INdictment for a Libel againſt ſeveral Subjects, &c. to the Jury, unknown. Et per Curiam, where a Writing which inveighs againſt Mankind in General, or againſt a particular Order of Men; as for Inſtance, Men of the Gown, this is no Libel, but it muſt deſcend to Particulars and Individuals to make it a Libel.

The Queen verſus Drake. Mich. 5 Annæ B. R.

2 Salk. 660. Information for a Libel differing in one Word from the Libel itſelf, not good. (2.) INformation againſt the Defendant, ſetting forth, that he being evilly diſpoſed, &c. did make a Libel entituled Mercurius, containing divers ſcandalous Matters ſecundum tenorem ſequen', and ſo ſet forth ſome Paragraphs, and in one of them there was the Word Nec inſtead of Non, ſo that it was not literally the ſame as in the Libel; however it did not alter the Senſe; but upon Not guilty pleaded, this Variance being perceived

ceived at the Trial, the Counsel for the Defendant insisted, that it might be found Specially, which was done; and afterwards, upon arguing this Special Verdict, Judgment was given for the Defendant: It was objected against him, that this Variance was immaterial, and that in every Action for Words the Plaintiff usually declares, for Speaking hæc Anglicana verba sequentia; but 'tis not necessary to prove every Word; therefore to make every literal Omission or Variation fatal, would be to make this Action impractible. But per Curiam, the * Tenor is the Transcript Copy of some Original, to which it may be compared, and therefore there can be no Tenor of Words spoken, because there is no Written Original; but there may be a Tenor of a Writing, which Word always imports a true Copy of the Thing written, and consists in Identity. Et per Holt Ch. Just. A Libel may be discribed either by the Sense, or by the Words; and therefore an Information charging, that the Defendant made a Writing, containing such Words, is good, and in such Case a nice Exactness is not required, because 'tis only a Description of the Sense and Substance of the Libel. But an Information, charging the Defendant with making a Writing secundum tenorem sequentem, there the Written Libel, and that set forth in the Information, must exactly agree, because every Word in the Information is a Mark of Description of the very Libel it self; so in Trespass, Quare clausum fregit, &c. if the Plaintiff sets forth the Buttalls and Boundaries of his Close, and fails in the Proof thereof, he cannot recover; because he is obliged to prove his Description; and there is no Difference between Wrongs done by Words and by Things.

* *Postea* 5. S. P.

(3.) Words are transient, and vanish in the Air as soon as spoken, and there can be no Tenor of them, as hath been already observed, and therefore an Identity is not required, and tho' the Jury find some Omissions, it will be sufficient, if some be proved, and in such Case the Plaintiff shall recover; but when a Thing is Written, tho' every Omission of a Letter may not make a Variance, yet if such Omission makes a Word of another Signification, 'tis fatal.

Dyer 203. 3 Cro. 503. 2 Cro. 407. Hob. 129. Yelv. 46, 152. 5 Rep. 53. Cro. Car. 328. 2 Saund. 121. Co. Ent. 508.

Cropp *versus* Tilney. Mich. 5 Will. III. B. R.

(4.) UPON a Writ of Error on a Judgment in an Action on the Case, wherein the Plaintiff declared, that he stood to be elected for a Member of Parliament, and that the Defendant caused a Libel to be printed of him with these Words, as spoken by the Plaintiff (viz.) There is a War with France, of

Innuendo, where good.

which I can ſee no End, unleſs the Young Gentleman on the other Side of the Water, (innuendo the Prince of Wales) be reſtored, per quod, he loſt his Election, ad damnum, &c. there was a Verdict for the Plaintiff, and Judgment in C. B and now, upon a Writ of Error in B. R. it was inſiſted, that an * Innuendo cannot beget an Action, nor make that certain which was incertain before, and that here was no Scandal; and if ſo, this was not a Libel. Sed per Holt Ch. Juſt. ſcandalous Matter is not neceſſary to make a Libel, 'tis enough, if the Defendant induces an ill Opinion to be had of the Plaintiff, or to make him contemptible and ridiculous; as for Inſtance, an Action was brought by the Husband for Riding Skimmington, and adjudged that it lay, becauſe it made him ridiculous, and expoſed him. Every Man underſtands who is meant by the Young Gentleman on the other Side the Water; if Words are False, the Defendant may juſtify in an Action, but not in an Indictment.

* 3 Cro. 428. 2 Rep. 10. Roll. 82. Yelv. 21. Hob. 6. 1 Roll. Rep. 24.

The King verſus Bear. Hill. 10 Will. III.

2 Salk. 417.

(5.) INdictment for Making, Writing, Compoſing and Collecting ſeveral Libels, in uno quorum continetur inter alia juxta tenorem & ad effectum ſequen', &c. after a Verdict this was held good, for juxta tenorem imports the ſame Words; for * Tenor is a Tranſcript, which it cannot be if it differs from the Libel; if it had been ad effectum ſequen', it would not do, for that might import an Identity in Senſe, but not in Words.

* *Antea* 2. S. P.

I Limi-

Limitation of Action. *See* Evidence 5.

Collins *verſus* Denning. Hill. 12 Will. B. R.

(1.) Aſſumpſit, in which the Plaintiff declared, that the Defendant being indebted to him (the Plaintiff) in 20 l. promiſed to pay it upon Demand, and that he (the Plaintiff) had on ſuch a Day and Place demanded it, but the Defendant refuſed to pay it; the Defendant pleaded Non Aſſumpſit infra ſex Annos, &c. and upon a Demurrer to this Plea it was inſiſted, that it was ill, for it ſhould not be Non Aſſumpſit, but Actio non accrevit infra ſex Annos, &c. becauſe the Duty ariſes from the Demand and not from the Promiſe: But this Objection was not allowed, for Payment upon Demand is no more than what is implied by Law.

Where *Non Aſſumpſit infra ſex Annos*, is a good Plea.

Ewers *verſus* Jones. Mich. 2 Annæ.

(2.) Libel in the Admiralty by the Seamen againſt the Owners for Wages, the Defendants pleaded the Statute of Limitations, (viz.) That it appeared by the Libel, that no Suit was proſecuted for this Matter within ſix Years, whereas they ſhould have pleaded directly, that no Suit had been brought within ſix Years after the Cauſe of Action accrued; and if the Statute had been rightly pleaded, it would have been a good Bar; for per Holt Ch. Juſt. tho' the Statute doth not extend to Cauſes maritime, ſpiritual, or equitable, but only to Duties at Common Law, yet Mariners Wages are a Duty at Common Law, and if ſued for at Common Law, the Statute would have been a good Bar.

Mod. Caſes 26. Statute not well pleaded.

Hide *verſus* Partridge. Paſch. 1 Annæ.

(3.) Upon a Motion for a Prohibition to the Admiralty, ſuggeſting a Contract at Land, and a Suit for Wages thereon by the Mariners againſt the Owners, upon an outward-

2 Salk. 424. Whether the Statute extends to Mariners Wages.

ward-bound Voyage, and that he had pleaded the Statute of Limitations in that Court, which Plea was rejected, for that the Statute did not extend to Causes maritime, &c. and that it was no Plea in Bar to a Trust or to a Legacy; and now it was insisted for the Prohibition, that the Common Law had a proper Jurisdiction for Mariners Wages, and that the Suit might be as well brought for such Wages in the Courts of Common Law as in the Admiralty, so that the Admiralty had at most but a concurrent Jurisdiction in this Case with the Courts of Common Law, and that only by Indulgence of Law, which ought not to be extended so far as to suffer them to proceed in the Admiralty, otherwise than they might at Common Law: Et per Holt Ch. Just. It is a Question among Merchants, whether Mariners Wages were due for outward-bound Ships: But per Powell Just. whether they are due or not, is a Question properly determinable in the Admiralty; and he questioned, whether the Statute could be pleaded to a Suit in the Spiritual Court for laying violent Hands on a Clerk; and per Holt Ch. Just. clearly it would be no Plea in that Case, no more than it would be to an Indictment at Common Law, for that is a Prosecution of a publick Nature, pro reformatione morum, and not a private Action of the Party to have Recompence in Damages, the Rule was for the Plaintiff to take a Prohibition, and to declare upon it.

Morse *versus* Braxton. Pasch. 12 Will. III. B. R.

An original in one County cannot maintain an Action in another County.

(4.) CASE, &c. in which the Plaintiff laid his Action in Norfolk; the Defendant pleaded the Statute of Limitations; the Plaintiff replied an Original taken out in Suffolk, upon which they were at Issue, and the Plaintiff had Judgment in C. B. but upon a Writ of Error in B. R. that Judgment was reversed, because an Original in one County cannot maintain an Action in another County.

Words which are actionable are not within the Statute.

(5.) Scandalum Magnatum is not within the Statute 21 Jac. cap. 16. nor slanderous Words, which are actionable only by Reason of any subsequent Loss or Damage, nor slandring a Title, but slanderous Words, which are personal and actionable in themselves, are within the Statute.

Where the Plaintiff is beyond Sea his Case is not within the Statute.

(6.) Where the Plaintiff is beyond Sea, his Case is not within the Statute; but if the Defendant is beyond Sea, 'tis otherwise.

Where a new Promise will revive the Action.

(7.) Where an Action is barrable by this Statute, a new Promise will revive it; so 'tis of an Acknowledgment, because that is Evidence of a Promise.

(8.) A Latitat taken out and continued is a good Avoidance of the Statute, for 'tis a Demand.

MANDAMUS.

Wilkins *versus* Mitchell.

(1.) IN an Action of Debt for Rent brought in an inferior Court, the Plaintiff was Nonsuit, whereupon the Defendant had Judgment, but they refusing to execute it, B. R. was moved for a Mandamus, but it was denied, because the Defendant had a legal Remedy, (viz.) By the Writ de executione judicii out of the Chancery.

Mandamus denied where the Party hath another, and proper Remedy.

The King versus Mayor of Dartmouth. Trin. 12 Will. III.

(2.) A Mandamus to restore W. N. to the Place servientis ad clavem, meaning the Serjeant of the Mace, &c. The Return was, that there was no such Office in that Corporation, but that there was an Office Servientis ad clavam, to which they prescribe to put in and out an Officer at Pleasure, &c.

Mandamus to restore a Serjeant *ad Clavem*, instead of *Clavam*.

The King versus Mayor of Andover. Trin. 12 Will. III.

(3.) MAndamus to restore him to the Place of an Alderman in Andover; the Return was, that he was so Poor that he could not pay the Taxes: Et per Holt Ch. Just. Where a Man tho' Poverty cannot pay his Scot and Lot, 'tis fit to deprive him of Magistracy, but not of Liberty; so a Mandamus was denied.

2 Salk. 433. It will not lie to restore a poor Alderman.

Lee

Lee *verſus* Oxenden. Trin. 3 Will. III. B. R.

3 Mod. 332. Not granted to reſtore a Proctor in *Drs. Commons.*

(4.) LEE ſuggeſting that he was debite juratus & admiſſus in loco & officio of a Proctor, &c. and alſo that he was diſplaced and amoved from his ſaid Office, prayed a Mandamus to be reſtored, and inſiſted, that he had a Freehold in his Office, and that it concerned the Adminiſtration of Juſtice, but the Mandamus was denied, becauſe this Matter was meerly ſpiritual, and B. R. cannot take Notice of it, nor correct Errors in their Proceedings, in Caſes where they have a proper Juriſdiction and Cogniſance; ſo that this being of an Eccleſiaſtical Nature, and the Deprivation being a judicial Act, it cannot be avoided but by Appeal.

The King verſus Mayor of Cheſter.

5 Mod. *Mandamus* to reſtore nine Perſons jointly, quaſhed for that Reaſon.

(5.) A Mandamus was granted to reſtore Brett and eight other Perſons to the Place of Common Council-men of Cheſter; the Mayor made a bad Return, however, the Court quaſhed the Mandamus, being joint for nine Perſons, when they had ſeveral Offices and Intereſts, and ought to have ſeveral Writs of Mandamus.

The Queen verſus Cory. Mich. 8 Will. III.

Where not granted without an Affidavit of the Fact.

(6.) THE Court was moved for a Mandamus to the Juſtices of Peace, for that they proceeded to remove W. R. from his Place of Abode, after he had offered to give Security to indempnify the Pariſh: Et per Holt Ch. Juſt. In a Matter of Right, as for Inſtance, where a Mandamus is prayed to reſtore a Man, &c. we never require an Affidavit of the Fact, but this is required upon a ſuppoſed Failure of Duty in the Juſtices, and therefore denied to grant a Mandamus till Affidavit made, &c.

King and Queen verſus Dr. Gower. Trin. 1694. B. R.

Mandamus will not lie to turn out a Fellow of a College.

(7.) A Special Mandamus was directed to Dr. Gower, &c. reciting, that ſuch particular Fellows of his College had not taken the Oaths, ſo that their Fellowſhips were void by the Statute 1 Will. 3. and requiring him to turn them out, and to place new Fellows in their Room; the Return was of ſeveral Statutes, one of which was, that no one ſhall loſe his Freehold with-

without being heard and admitted to anſwer the Charge, and that the Perſons named in this Mandamus were duly elected, &c. and that non conſtat, &c. but they had taken the Oaths: Et per Curiam, as to this laſt Part of the Return, 'tis ill, becauſe the Oaths are to be taken before the Maſter and Fellows; but the chief Queſtion was, whether a Mandamus would lie in this Caſe, and in this Manner, and the Court inclined, that it would not, becauſe the Fellows who are to be turned out, are no Parties to this Writ, ſo that they would be diſplaced without being heard, and without Anſwer; and this differs from the Common Caſes of Mandamus, which are uſually to reſtore Men to their Rights, and are directed to them by whom the Injury is done; and tho' it may happen, that even in ſuch Caſe a Man may be turned out of his Place, yet that is collateral, and not by Command of the Writ.

The King verſus Taylor.

(8.) MAndamus to reſtore him to his Place of Alderman of the City of Glouceſter; the Return was made by the Mayor and Bailiffs, (viz.) they returned their Power, &c. and that Taylor was removed by thirty of the Common Council-men in the Council-Chamber aſſembled, for that he was a Common Drunkard. Et per Curiam, this Return was adjudged ill, becauſe it did not appear, that the thirty Common Council-Men were then and there aſſembled as a Common Council, for they might be there to Feaſt, or to other Purpoſes.

Mandamus, to whom to be directed, and where the Return was ill, and where the Cauſe of Removal was Juſt.

But that the Cauſe returned was ſufficient to remove him. 'tis true, if a Man is Drunk by Accident, that would not be Cauſe to remove him; but habitual Drunkenneſs makes a Man unworthy to be a Magiſtrate, and diſables him in Point of Government.

Tho' the Removal was by the Mayor and thirty of the Common Council-men, yet the Writ ought not to be directed to them, but to the Corporation by its proper Name, as it was in this Caſe to the Mayor and Bailiffs.

But the Return being ill for the Reaſon before mentioned, a Writ of Reſtitution was granted; and afterwards the Queſtion was, whether the Corporation might proceed againſt him de novo for his Drunkenneſs? and the Court held they might.

1 Roll. Rep. 409.
3 Bulſt. 189.

The

The King versus White. Trin. 2 Annæ.

Denied to restore a Clerk of a Company in *London.*

(9.) MAndamus to restore him to his Place of Clerk to the Butchers Company in London, it being a Charter-Office; but per Curiam, it was denied, for if 'tis an Office of Freehold, he may have an Assise, if 'tis not an Office of Freehold, then 'tis only a Private Service, which doth not concern the Publick.

The Queen versus Inhabitants of Littleport. Hill. 2 Annæ.

2 Salk. 531. Mod. Cases 97. *Mandamus* to the present Overseers to make a Rate to reimburse the old ones.

(10.) THIS Case is reported in 2 Salk. by the Name of Tawny's Case, it was thus S. A Mandamus to the Churchwardens and Overseers of the Poor of the Parish of Littleport, to make a Rate to reimburse the old Overseer of the Poor what Money he had laid out of his own for Relief of the Poor: The Return was, that the major Part of the Parishioners did not agree to his Accompt; and the Question was, whether the Plaintiff Tawney, being a former Overseer, but now out of his Office, should have a Mandamus to the present Overseers to make a Rate to reimburse the Money he laid out of his own to relieve the Poor? It was insisted in his Behalf, that he should have a Mandamus, because he was indictable for not relieving the Poor, tho' he had none of the Parish Money in his Hands, and he might die in his Office, therefore it seems reasonable, that the Law should give him some Remedy since it subjects him to this Charge. But per Curiam, The Law doth not oblige him to lay out his own Money to relieve the Poor; but he is to make a Rate, and this is to be allowed by the Justices, and the Poor are to be relieved out of this Money when raised; otherwise the Consequence would be, that Overseers of the Poor would lay out what Money they pleased, and Charge the Parish with it; so that what he did in this Case was voluntary, being in no wise compellable to do it, and therefore it would be unreasonable in this Court, to compel the succeeding Overseers to reimburse him; he should either have kept his own Money, or taken Care to have a Rate made, and that would have been his proper Method; and this Court never allows a Mandamus where the Law hath provided another Remedy, and a Rate cannot be made as for him, but to relieve the Poor.

The Queen versus Sir Richard Raines. Mich. 6 Annæ.

(11.) There is a Case reported by this Name in 1 Salk. but 'tis not the same Case, nor in the same Term, but four Years after. ſſ. Mandamus to admit her to the Probate of a Will by which she was Executrix; the Return was that she was made Executrix durante minore ætate of W. R. and that the said W. R. was now of full Age, so that the Testator remained Intestate. Et per Holt Ch. Just. He should have returned generally, that she was not Executrix, or if he would return the Special Matter, as he hath done, he should have averred, that she was not Executrix aliter vel alio modo; but that the Return now made was not a direct Answer to the Writ, but only Argumentative, to shew that she was not Executrix. But the Court would not grant a peremptory Mandamus; they quashed this for the Insufficiency of the Return, and amerced the Defendant, and ordered an alias Mandamus, that the Suggestion of the Writ might be fully and plainly answered. 1 Salk. 299. Mich. 10 W. *Mandamus* to admit one to the Probate of a Will.

(12.) Tho' the Return is insufficient, yet if it appear thereby that the Party ought not to be restored, he shall no be restored. Sid. 14.

(13.) Where the Place is of meer Service, no Mandamus will lie; as for an Usher of a School; but where 'tis an Office, as Churchwarden, Sexton, Steward of a Court, &c. a Mandamus will lie; and so it will to restore an Attorney to his Place of Attorney in an Inferior Court, and to restore the Treasurer of the New-River-Water; but it will not lie to restore a Proctor of the Spiritual Court. Sid. 457. Sid. 69, 152. Sid. 169. 3 Mod. 332.

(14.) A Fellow of New College was expelled by the Warden, &c. whose Sentence was confirmed by the Visitor; and this being returned on a Mandamus, it was objected, that the Cause of his Expulsion did not appear. Sed per Curiam, this being a private Eleemosinary Society, and a Visitor appointed by the Founder, no Mandamus lies; and therefore 'tis to no Purpose to object against the Return. Bagg's Case was the first Mandamus of this Sort; as for those mentioned in Ryley they are no more than Letters Recommendatory. 2 Lev. 14.

(15.) Mandamus lies to restore a Sexton upon a Certificate, that he is an Officer for Life, and had so much of every House in the Parish for Wages. 2 Lev. 18.

1 Vent. 302. (16.) Mandamus to restore a Common Council-man; the Return was, that he said Alderman W. R. was a Knave; disallowed, for the Words have no Reference to the Corporation: It was held by my Lord Hale, that Returns of this Nature ought to be sworn, and that it was so done in Meddlicott's Case; but of late it was disused.

Master and Servant.

Sir Robert Wayland's *Case.*

Where the Master is liable for the Cheat of his Servant.

(1.) HE used to give his Servant Money every Saturday to defray the Charges of the foregoing Week, the Servant kept the Money, yet per Holt Ch. Just. the Master is chargeable, for the Master at his Peril ought to take Care what Servant he employs; and 'tis more reasonable, that he should suffer for the Cheats of his Servant than Strangers and Tradesmen; so if a Smith's Man picks my Horse, the Master is liable.

1 Roll. 94, 95.

Boulton *versus* Arlsden. Pasch. 9 Will. III. B. R. *at the Sittings at* Guildhall, coram Holt Ch. Justice.

Where the Master is not liable for his Servant.

(2.) IN this Case it was held, that where a Servant usually buys for his Master upon Tick, and takes up Things in his Master's Name, but for his own Use, that the Master is liable, but 'tis not so where the Master usually gave him Ready Money.

That where the Master gives the Servant Money to buy Goods for him, and he converts the Money to his own Use, and buys the Goods upon Tick, yet the Master is liable, so as the Goods come to his Use, otherwise not.

That a Note under the Hand of an Apprentice shall bind his Master, where he is allowed to deliver out Notes, tho' the Money is never applied to the Master's Use.

But where he is not allowed or accustomed to deliver out Notes, there his Note shall not bind the Master, unless the Money is applied to the Master's Use.

(3.) A Factor of the East-India Company carried over 1200 l. in Gold to India, where a Custom was due for it, but saved by the Factor and never paid: Et per Curiam, the Factor shall have the Benefit of it, and not the East-India Company, for it was due from them and ought to have been paid; therefore they cannot make a Title to it against one who hath the Possession, for that is sufficient against all Persons but against him who hath the very Right, and the Non-payment in this Case was at the Peril of the Factor.

Ch. Rep. 25. Where a Factor of the *East-India* Company shall have the Benefit of what he saved, and which the Company ought to have paid.

MISCASTING. *See* Money.

MISNOSMER.

Lepara *versus Sir* John Jermaine. Pasch. 1 Annæ.

(1.) THE Defendant was sued by the Name of John Jermaine, Knight; he pleaded in Abatement, that he was a Knight and Baronet; the Plaintiff replied, that he (the Defendant) was a Knight only; but the Plaintiff perceiving his Mistake, and the Proceedings being all in Paper, he prayed

1 Salk. 58. Baronet is a Dignity and Part of his Name.

Leave to amend, but it was denied, because there was nothing to amend by, for the Bill and Process was by the Name of Knight; then the Question was, whether Baronet was such a necessary Part of his Name, as the Action must abate for Want of it: Et per Holt Ch. Just. Baronet is as an essential Part of his Name as Knight, because 'tis a Dignity, and whether 'tis created by Act of Parliament or by Letters Patents, 'tis Part of his Name, as Duke, Viscount, Marquis, Baron, tho' as to this last Name of Dignity, there is a Difference between a Baron by Tenure and a Baron by Patent, for in the first Case, Baron is not a Name of Dignity; and if 'tis omitted it shall not abate the Action, but a Baron by Letters Patents is a Dignity, and Part of his Name.

The King versus Bishop of Chester.

Where the Declaration is aided by the Verdict.

(2.) IN a Quare Impedit, the Plaintiff claimed under a Grant to Sir William Sands, who granted to the Lord Derby; the Defendant pleaded, that Sir William Sands, non concessit to the Lord Derby, upon which they were at Issue, and the Jury found, that it was granted to the said William Sands in the Declaration, by the Name of William Sands Esq; being then an Esquire, and afterwards made a Knight: Et per Curiam, this Declaration is aided by the Verdict, by which the Grant and the Identity of the Person were found; and this Explanation is no more than what is often done by the Plaintiff himself in late Cases, as for Instance, where W. R. is bound in a Bond by the Name of W. R. Esq; and is afterwards Knighted, the Plaintiff must bring his Writ against him by the Name of W. R. Knight, but in his Declaration he must shew the Special Matter, (viz.) that the Defendant bound himself by the Name of W. R. Esq; and was afterwards Knighted; but 'tis otherwise if the Defendant had craved Oyer of the Bond and demurred.

The King versus Bishop of Chester *and* Peirce.

2 Salk. 360. Knight is a Dignity and Part of his Name.

(3.) IN a Quare Impedit, the Defendant, as Patron, pleaded a Grant made by King Charles I. to William Thackston Armigero, postea militi, who granted it to the Defendant; the Plaintiff craved Oyer of the Letters Patents, &c. and it appeared to be a Grant to Sir William Thackston Knight, and upon a Demurrer to the Plea, Rookby Just. was of Opinion, that this might be the same Person, for he might have such a Name by Reputation: But per Holt Ch. Just. a Grant to William Thackston Esq; by the Name of William Thackston Knight, cannot be good, because Knight is a Name of Dignity, and Part of his

his Name, and as much his Name as the Name of Baptiſm; and if he might have ſuch a reputative Name, he ought to have pleaded it ſo, (viz.) per nomen, or cognitus & reputatus per nomen, &c. as in the Caſe of a Baſtard; but Knight cannot be a Name in Reputation, there is no Foundation for it, as in the Caſe of a Baſtard, or the eldeſt Son of a Duke, who by the Laws of Heraldry takes Place as a Marquiſs, but the Title of Knight can be only conferred by the King; and in antient Conveyances the eldeſt Sons of Dukes and Earls had only the Addition of Eſq; commonly called Marqueſs, &c. and now the Courſe is to make the Addition of eldeſt Son to ſuch Title.

College of Phiſitians verſus Dr. Salmon.

(4.) DEBT againſt the Defendant, for practiſing Phiſick without Licence, in which the Plaintiffs declare by the Name of the Preſident of the College, ſeu Communitas of the Faculty of Phiſick in London, &c. The Defendant craved Oyer of the Letters Patents, whereby it appeared they were incorporated by the Name of the Preſident, College, ſive Communitas of the Faculty of Phiſick in London, and were empowered to ſue and be ſued by the Name of Preſidens Collegii, ſive Communitatis facultatis medicinæ in London, and then pleaded Miſnoſmer in Abatement: Et per Curiam, the Plea was adjudged good, for they may ſue by their Name of Incorporation, which is Preſident, Collegium, ſive Communitas of the Faculty of Phiſick, &c. or by the Name given to them for that Purpoſe, which is Preſidens Collegii, ſive Communitatis, &c. but here they ſue by neither of thoſe Names, but by the Name of Preſident of the College, ſeu communitas, &c. ſo Judgment was given quod Billa caſſetur. 5 Mod. 327. 2 Salk. 451. Miſnoſmer in the Name of the Corporation.

Afterwards, Trin. 13 Will. 3. B. R. another Action was brought by the ſame Plaintiff againſt the ſame Defendant, and for the ſame Cauſe; and this was brought in the Name of Preſident, College, or Commonalty, which was the true Name of Incorporation; and upon Demurrer it was objected, that it ought to be brought in the Name of Preſident of the College, for by that Name they have Power to ſue: Sed per Curiam, they may ſue by the Name of Incorporation, or by the Name of Preſident only; but tho' by their Charter they have Power to ſue by that Name; yet per Holt Ch. Juſt. 'tis better (as in this Caſe) by the Name of their Incorporation.

Anonymus. Hill. 2 Annæ.

Traverſe of his Name, where 'tis repugnant.

(5.) THE Plaintiff declared againſt the Defendant by the Name of John, the Defendant pleads he was baptiſed by the Name of Benjamin, and traverſed, that ipſe idem Johannes was ever known by the Name of John; and upon a general Demurrer to this Plea, per Holt Ch. Juſt. this Traverſe is repugnant in it ſelf, and ſtands but as Matter of Form, yet Pleas in Abatement are not within the Statute of Eliz. but only Pleas to the Right and to the Merits of the Cauſe; but tho' the Traverſe was repugnant, 'tis not immaterial, becauſe it waived the precedent Matter, which was pleaded before of Baptiſm, and was become the Subſtance of the Plea it ſelf, ſo that now the Iſſue muſt be by what Name the Defendant was called and known, and not by what Name he was baptiſed; but he might have relied upon his Name of Baptiſm, and concluded with it, for a Man can have but one Name of Baptiſm, therefore it implies a Negative of it ſelf, without ſaying, that he was called or known by no other Name.

Anonymus. Mich. 10 Will. III.

Where an *Alias dictus* is proper.

(6.) THE Obligor was bound by the Name of W. R. he may be ſued by the Name of W. R. alias dictus W. C. if his Name is ſo; but if his Name is R. W. the Obligee cannot ſue him by the Name of S. W. alias dictus R. W. for he cannot have two Names of Baptiſm, neither is there any Remedy, unleſs he hath eſtopped himſelf by Appearance.

Knight's *Caſe*. Trin. 2 Annæ.

1 Salk. 129. Where *John* was ſued, and he pleaded in Abatement, that his Name was *Thomas*.

(7.) ACtion againſt John Knight, the Defendant pleaded in Abatement, that his Name is Thomas, and thereupon the Plaintiff commenced a new Action againſt him by his right Name Thomas; the Defendant pleaded in Abatement a former Action depending; and upon a Demurrer to this Plea it was inſiſted, that the Averment was againſt the Record, for that John and Thomas could not be the ſame Perſon: Sed non allocatur, for in Fact it may be ſo, the Plaintiff ſhould have confeſſed the Miſnoſmer, and prayed an Abatement of his Writ before he had proceeded to a new one.

Allen *verſus* Symonds.

(8.) CASE, &c. in which the Plaintiff declared againſt the Defendant by the Name of Symonds; the Defendant pleaded in Abatement, that he was known by the Name of Symms, abſque hoc, that he was known by the Name of Symonds; the Plaintiff replied, that he (the Defendant) was known as well by the one Name as by the other; and upon a Demurrer to this Replication, per Holt Ch. Juſt. the * Precedents are both Ways; thereupon the Defendant accepted a new Declaration, but without Payment of Coſts. 4 Mod. 347. * Raſt. Ent. 716. Old. Ent. 27.

MONEY.

Dixon *verſus* Willows. Mich. 8 Will. III.

(1.) UPON a Motion in Arreſt of Judgment, after a Verdict upon an Indebitatus Aſſumpſit for 13 l. 10 s. for nine Guineas, without ſaying ad valorem: It was held, that the Broad-Peices were in Effect the firſt Guineas coined in England for 20 s. and went at that Rate for ſome Time; but the Value of Gold riſing, theſe Broad-Peices were made current by Proclamation at 1 l. 1 s. 4 d. and tho' there was afterwards a ſecond Riſe in the Price and Value of Gold, yet there was no Proclamation to raiſe the Value of theſe Peices in Proportion to the Value of Gold. But afterwards, when Guineas were coined, they were made in Reſpect to the Value ſet upon Broad-Peices by Proclamation, as aforeſaid; tho' there is no Act of Parliament or Order of State for theſe Guineas as they now are taken, yet being coined at the Mint, and having the King's Inſignia on them, they are lawful Money, and current at the Value they were coined and utter'd at the Mint. 2 Salk. 446.

(2.) Af-

1 Lev. 58. (2.) Aſſumpſit for ſeveral Particulars, amounting in all to 70 l. but by Miſcaſting it was alledged to amount to 90 l. per Curiam, ſhould the Jury give above 70 l. the Verdict would be naught, if under 70 l. 'tis good.

2 Lev. 4. (3.) Debt for Rent, and the Plaintiff demanded leſs than due, adjudged ill after a Verdict; the Caſe was, that the Year's Rent amounted to 60 l. and the Plaintiff declaring for the Arrears for one Year and an Half, demanded 80 l. whereas it came to 90 l. See Cro. Eliz. 22. contra.

2 Lev. 57. (4.) In Covenant, and a general Demurrer to the Declaration, for that the Plaintiff demanded more than appeared to be due, upon the firſt Breach, and leſs upon the ſecond. Et per Curiam, the firſt may be cured by the Plaintiff's Releaſe, or by the Verdict upon the Writ of Inquiry finding leſs; and as to the ſecond, 'tis well after Verdict, or upon a General Demurrer, but not upon Special Demurrer, and ſhewing it for Cauſe.

MORTGAGE.

Gory's *Caſe*. Hill. 9 Will. III. in Cancellaria.

(1.) DEcreed by the Lord Chancellor Somers, that where a Mortgagee lends more Money upon Bond to the Mortgagor, he ſhall not redeem unleſs he pay the Principal and Intereſt due on the Bond, as well as on the Mortgage. But if he mortgage the Equity of Redemption to another, the ſecond Mortgagee ſhall not be affected with this Bond, becauſe 'tis but a perſonal Charge upon the Mortgagor. Et per Holt Ch. Juſt. if a Purchaſer pay the Money to the Mortgagee, he (the Mortgagee) is become a Truſtee for the Purchaſer.

(2.) One having the Reversion in Fee expectant upon the Determination of a Lease for Life, in an Estate worth 1000 l. per Annum, conveys it in Fee to W. R. in Consideration of 1000 l. and no more, the Tenant for Life dies, and now the Conveyance to W. R. is pretended to be no more than a Mortgage, because he had declared, That he did not know how long he should enjoy the Estate, and that he would take his Money again, with Interest: Sed dubitatur per Curiam, because W. R. had no Remedy to recover his Money; and where a Mortgagee cannot compel the Repayment of his Money, the Mortgagor shall not enforce a Redemption, for the Remedy ought to be reciprocal; and besides, Matter subsequent will not make it a Mortgage, if it was not so upon the original Agreement.

1 Ch. Rep. 1. Where a Mortgagee cannot have a Remedy to recover his Money, the Mortgagor cannot compel a Redemption.

(3.) Where a Mortgagee assigns the Mortgage, all Money really paid by the Assignee, if due at that Time, shall be accounted Principal as to the Mortgagor, whenever he comes to redeem.

1 Ch. Rep. 68. Where a Mortgagee assigns, all the Money then due shall be Principal.

(4.) When the Heir of the Mortgagee is to reconvey the Estate mortgaged, and there is no Defect of Assets in the Hands of the Executor, the Redemption-Money shall be paid to the Heir, if the Condition was to pay it to him; so if it was to pay it to the Mortgagee, his Heirs or Assigns; so it is if it was to be paid to his Heirs or Executors; but 'tis otherwise, if it was to be paid to the Executors only.

1 Ch. Rep. 83. Redemption-Money to be paid to the Heir, if no Defect of Assets in the Executor. *Postea* 7.

(5.) Mortgagee, where the Mortgage is forfeited, shall have Interest for his Interest; and so shall an Assignee, for all Interest due from the Time of the Assignment.

1 Ch. Rep. 258. Where a Mortgagee shall have Interest for his Interest.

(6.) Mortgage to W. R. and his Heirs; but that they should reconvey, if the Mortgagor, his Heirs, Executors or Administrators should repay the Principal Sum and Interest to the said W. R. his Heirs, Executors, Administrators or Assignes; the Mortgagee died, and the Mortgage being forfeited, the Question was, whether the Heir of the Mortgagee, or his Executors, should have the Redemption-Money, for the Heir was to reconvey, and there was no Defect of Assets in the Executors Hands; and by the Condition it was limited to the Heir as well as to the Executor. Adjudged, that Equitas sequitur legem as near as may be; now if the Condition had been to repay, without mentioning to whom, in such Case the Executor should have the Money; because it first came out of the personal Estate; but the

1 Ch. Rep. 283. Where the Redemption-Money shall be paid to the Heir, and where to the Executor. *Antea* 5. S.P.

Benefit of Redemption being forfeited in Law, 'tis all one in a Court of Equity, as if neither Heir or Executor had been named; and therefore in that Case Equity will appoint the Executor to have it, because the Right of the Mortgagee was only to the Money, for which the Land was no more than a Security, and as his Right to the Land was in that Respect only, therefore the Money is personal Estate, and must come to the Executor; but where the Condition appoints the Money to be paid either to the Heirs or Executors in the Disjunctive, and the Mortgagee comes at the Day, he hath his Election by Law to pay it to either; and all Mortgages belong to the personal Estate, tho' made in Fee.

NOBILITY.

The King versus Knollis. Trin. 6 Will. III. B. R.

1 Salk. 509. Where Nobility was pleaded in Abatement to the Writ.

(1.) THIS Case is reported in 2 Salk. but it was as followeth: The Defendant was indicted by the Name of Charles Knollis Esquire, at Hicks's Hall, for Murder, which Indictment being removed into B. R. by Cetiorari he pleaded in Abatement, that William Knolls, Viscount Wallingford, was by Letters Patents under the Great Seal of England, which he produced in Court, created Earl of Banbury, to him and the Heirs Males of his Body; that he died, and that the Honour descended to Nicholas Knolls his Son and Heir, who died, and the Honour descended on the Defendant, Son and Heir of the said Nicholas. Et hoc paratus est verificare. The Attorney-General replied, that the Defendant on such a Day petitioned the Lords in Parliament to be tried by his Peers, and that they upon Consideration thereof, dismissed his Petition, and disallowed his Peerage; and upon a Demurrer to this Replication, these Exceptions were taken to the Plea.

(1.) Because it doth not conclude prout patet per Recordum.

(2.) That there ought to have been a Writ to certify the Descents.

(3.) That

(3.) That the Plea ought to have averred Banbury to be in England.

(4.) That the Defendant did not plead, that he was unus parium Regni Angliæ.

(5.) That this Plea is avoided by the Replication, that the Defendant was barred of his Peerage by the Order of the House of Lords.

Which Objections were thus answered.

(1.) And first the Court held, that here being Descents pleaded, which are Matters of Fact, for that Reason prout patet per Recordum would have been a very improper Issue, and that Earl or no Earl could not have been an Issue in this Case, but non concessit only, because the Letters Patents are set forth upon Record, and therefore they held Nobility in this Case triable per Pais; so where Nobility is gained by Matter of Fact, 'tis triable as aforesaid, as for Instance, where 'tis gained by Marriage; but where 'tis by Writ only, or by Patent, without Descents, 'tis not triable but by Record, and in such Case the Plea must conclude prout patet per Recordum, and so are the * old Books to be intended. * 22 Assise 24. Br. Assise 240.

(2.) As to the second Objection, a Writ to certify the Descents is only cautionary and not necessary.

(3.) They held, that the Defendant need not aver Banbury to be in England, for it will be intended that it was; besides, an Earldom consists in Dignity and Office, and 'tis not material whether the Place be in England or not, as for Instance, there is no such Place as Rivers, or Albemarle in England, and yet there are such Earls; for the Great Seal, which necessarily relates to England, makes them English Peers; 'tis true, the King may create an Irish Peer under the Great Seal, but that must be by express Words in the Patent.

(4) The Defendant needs not aver, that he is unus parium Regni Angliæ, because he appears to be so by Letters Patents now produced; and as to that Matter, Eyre Justice took this Difference, (viz.) where Peerage is claimed * ratione Baronii, as by a Bishop, he must plead, that he is unus parium Regni Angliæ, but where the Claim is ratione nobilitatis, he needs not plead otherwise, than pursuant to his Creation. 4 Inst. 15.

(5.) It was adjudged, that the Order of the House of Lords did not take away the Defendant's Peerage, nor conclude him, because his Cause was not properly before them; * the Course is where a Man is disturbed in his Title, to Petition the King, who indorses the Petition and sends into Chancery. * Stamf. Prær. 72. 22 Ed. 3. 5. L. quinto Ed. 4. 117.

The Dignity of Peerage may be forfeited by Attainder, but it cannot be ſurrendered or transferred by Fine.

(2.) A perſonal Honour, as the Dignity of Peerage may be forfeited by Attainder, for 'tis implied by a Condition in Law, that the Perſon dignified ſhall be loyal; and this Dignity after Attainder cannot deſcend, becauſe the Blood by which it is to deſcend is corrupted; ſuch Dignity cannot be ſurrendred, or transferred by Fine, for 'tis a Quality affixed to the Blood, and ſo meerly perſonal, that a Fine cannot touch it; beſides, if it was permitted, it would draw the Trial of Peer or no Peer into the Court of Common Pleas, which is determinable only in Parliament, (viz.) in the Houſe of Peers.

NOLLE PROSEQUI.

The Serjeant's Obſervations upon this Title, and upon a *Retraxit*.

Difference between a Nonſuit and *Retraxit*.

(1.) A Nonſuit is where the Plaintiff ought to appear but makes Default, but a Retraxit is where the Party is in Court and makes Default.

Nonſuit is never peremptory before Appearance.

(2.) A Nonſuit is either before Appearance, at the Return of the Writ, or after, at ſome Day of Continuance, for the Plaintiff is always the firſt Agent, but 'tis never peremptory before Appearance; 'tis true, after Appearance, and in ſome Caſes, 'tis peremptory, as in Appeals, Quare Impedit, and Attaints, &c.

Where the Nonſuit of one is the Nonſuit of all.

(3.) In perſonal Actions, the Nonſuit of one is the Nonſuit of all the Plaintiffs, except in ſome Caſes, where Summons and Severance is allowed; 'tis ſo in Treſpaſs, and 'tis ſo in Debt, as for Inſtance, if an Action of Debt is brought againſt A. B. and C. by ſeveral Præcipe's, a Nonſuit quoad A. is a Nonſuit quoad the other two, but 'tis otherwiſe in a Diſcontinuance.

(4.) So where an Action of Debt was brought against three Co-heirs, two of them confessed Assets, and being at Issue with the Third, the Plaintiff was Nonsuit, this shall enure to all. See *Sid.* *Blake's* Case.

(5.) At Common Law, upon every Continuance or Day given, the Plaintiff might be Nonsuit, so that even after a * Verdict, if the Court took Time to consider and be advised, the Plaintiff was demandable and might be Nonsuit; but this is now remedied by the Statute 2 H. 4. yet after a * Privy Verdict the Plaintiff may still be Nonsuit, and so he may after a Special Verdict found, because the Matter was argued, and so he may after a Demurrer, tho' the Matter was argued, if the Court give a Day over, for the Plaintiff is then demandable. * 1 Inst. 139. b. * Dyer 53.

(6.) As to a Retraxit the Rule is, Qui semel actionem renunciavit amplius repetere non potest, therefore a Retraxit is a Bar to any Action of equal Nature brought for the same Cause or Duty, but a Nonsuit is not.

(7.) A Retraxit must be always in Person, for the Entry is Venit & fatetur se nolle ulterius prosequi, and therefore, if 'tis by Attorney, 'tis Error. 8 Rep. 58. in *Beecher's* Case.

(8.) Two joint Obligors, one was sued, and as to him a Retraxit was entered, and afterwards the Obligee brought an Action of Debt against the other, who pleaded this Retraxit in Bar to that Action; and the better Opinion was, that it was a good Bar. 1 Cro. 551.

Goddard *versus* Smith. Mich. 3 Annæ.

(9.) THere is a short Note of this Case in 2 Salk. but the Case was as followeth:

If. W. R. being indicted for Barretry, the Attorney-General entered a Non pros. (viz.) Quod attorn' generalis Dominæ Reginæ, ipsum inde non vult ulterius prosequi, whereupon W. R. brought an Action on the Case against the Prosecutor, for a false and malitious Indictment prosecuted against him (the Plaintiff) Et quod fuit debito modo inde exoneratus, and at the Trial gave this Non pros. in Evidence: Sed per Curiam, it ought to be an Acquittal upon the Merits of the Cause, which was never tried in this Case, and there was no Default in the Defendant in not having it tried: Et per Holt Ch. Just. this is no Discharge, 'tis only putting the Defendant sine die, the Attorney may take out new 2 Salk. 456. Where a *Non pros.* is no Discharge.

new Proceſs if he will: Sed per Harecourt, Clerk of the Crown-Office, it was never yet done, Non Pros's have been frequent upon Informations, but never upon Indictments, till the Reign of Car. 2. and the Court thought it hard that the Attorney-General ſhould allow them.

Cree *verſus* Rolls. Paſch. 13 Will. III.

Where a *Non Proſ.* may be entered, where not.

(10.) IN Ejectment againſt two Defendants; afterwards, at the Niſi prius, the Plaintiff entered a Retraxit againſt one of them, and the Cauſe was tried againſt the other; adjudged, that before the Record is ſent down by Niſi prius, either before or after Iſſue joined, the Plaintiff may enter a Non Proſ. againſt one Defendant where they ſever in their Pleas, but where they do not ſever the Plaintiff cannot enter a Non Proſ. as to one of them.

(2.) That there cannot be a Non Proſ. at the Trial at the Aſſiſes.

NOTICE.

1 Roll. Rep. 469. *contra.* 1 Vent. 78. Where ſpecial Notice muſt be given.

(1.) WHere a Promiſe was made to pay the Plaintiff 20l. upon his Return from Hamburgh, the Plaintiff muſt give Notice of his Return, and alledge it ſpecially in his Declaration.

2 Lev. *Williams* v. *Fry.* Where a Perſon is bound to take Notice of a conditional Limitation.

(2.) Deviſe to his youngeſt Daughter in Tail, provided, that if ſhe marry without the Conſent of W. R. then to his ſecond Son in Tail; the Daughter married without the Conſent of W. R. and the ſecond Son entered, and both are found to be Infants, and alſo that the Daughter had no Notice of the Condition: adjudged, this is a conditional Limitation, and that the ſecond Son might enter, and that Want of Notice will not excuſe the Daughter, becauſe no one is bound to give her Notice; and as ſhe takes Notice of the Eſtate deviſed to her, ſo ſhe is bound to take Notice of the Condition upon which ſhe takes it; but 'tis otherwiſe where the Deviſe is to the Heir at Law upon ſuch a conditional Limitation, becauſe he may enter generally, as Heir, not knowing there was a Will.

(3.) Where a Man covenants to make W. R. such an Estate in D. the Covenanter ought to give Notice to W. R. what Manner of Conveyance he intends; that if it be a Feoffment, W. R. may be ready on the Land to take Livery and Seisin. 1 Vent. 447.

(4.) So where a Man covenants to levy a Fine to W. R. the Covenanter must give Notice whether, he intends to levy it in Court, or by Dedimus. 1 Vent. 143.

(5.) an Award, that A. shall make B. a Lease, &c. within six Months following, and that upon making thereof B. shall pay the other 50l. A. needs not give Notice when he will make the Lease.

(6.) One married a City Orphan in Surrey, knowing her to be such; adjudged, that he is punishable, because he is bound to take Notice, that she was a City Orphan, and the rather, because no Body is bound to give him Notice. 1 Vent. 130.

NUSANCE.

Arnold *versus* Jefferson. Mich. 9 Will. III.

(1.) IN this Case it was held, per Holt Ch. Just. that an Assise or Quod permittat, &c. Quare erexit quædam edificia is good, for there may be a Building without a Proper Name; it lies de * Fabrica, which is a Word more incertain than Edificia, yet it will not lie * de mole, because the Thing it self is not to be recovered as in a Præcipe. 2 Salk. 654. Assise where 'tis good, where not. * N. B. 184. * 3 Cro. 402, 580.

(2.) Stopping of Lights is a Nusance, but Stopping a Prospect is not; as for Instance, one who had an House and Lights Time out of Mind, the Neighbour and Owner of the next Field built a Shed, which stopped the Lights, and then made a Lease thereof to W. R. against whom the Plaintiff brought an Action for this 1 Mod. 54. Stopping Lights where 'tis a Nusance, and how to be abated. 1 Roll. Rep. 22.

this Nuſance. Et per Curiam, admitting he might have an Aſſiſe of Nuſance againſt the Builder, yet he cannot have an Action againſt his Leſſee, becauſe it would be Waſte in him to pull down the Shed and abate the Nuſance; but the Plaintiff may ſtand on his own Ground and abate it. Et per Curiam, where the Thing done is a Nuſance per intervalla, as a Cock, or Pipe or Gutter an Action lies againſt the Leſſee, becauſe every freſh Running is a freſh Nuſance; yet if W. R. have a Way over the Ground of W. W. and he ſtops that Way, and then demiſes the Ground to C. an Action lies againſt the Leſſee, for continuing this Nuſance.

2 Cro. 491. 5 Rep. 104. 2 Roll. 193. 2 Roll. Rep. 3. 30. *contra.* Who may build a Pidgeon-houſe, who not.

(3) A Lord of a Manor may build a Dove-Cote upon his Land, Parcel of his Manor, and this he may do by Vertue of his Right, as Lord thereof; but a Tenant of the Manor cannot do it without Licence, for he can have no Right to any Privilege that may be prejudicial to others; but this is not a Common Nuſance, nor puniſhable in the Leet; but the Nuſance being particular, the Lord ſhall have an Action on the Caſe, or an Aſſiſe of Nuſance, as he may for building an Houſe to the Nuſance of his Mill.

OATH.

Cro. Eliz. 486. Difference where the Oath is to do a Spiritual and Temporal Thing.

(1.) Aſſumpſit, &c. in Caſe he would make Oath before ſuch a Perſon, he promiſed, &c. Et per Curiam, Oaths are either by Compulſion or Voluntary, and a Voluntary Oath by the Conſent and Agreement of the Parties, is lawful; and in ſuch Caſe, if 'tis to do a Spiritual Thing, and the Party fail, he is ſueable in the Eccleſiaſtical Court, pro læſione fidei; and if 'tis to do a Temporal Thing, he might formerly be puniſhed in the Star-Chamber, if he failed, and now in B. R.

Hilton *verſus* Byron. Paſch. 11 Will. III. B. R.

Quakers ſolemn Affirmation not allowable in criminal Caſes.

(2.) THE Plaintiff Hilton being a Quaker, moved for an Attachment againſt Byron, offering to make his Solemn Affirmation, according to the late Act, that he went in

Danger of his Life. Sed per Curiam, it was denied, unless he would take his Oath in Common Form, for this being a Criminal Proceeding, 'tis out of the Statute.

Hippsley *versus* Tuck.

(3.) A Writ of Error was brought upon a Judgment in an Inferior Court, of which Court the Mayor of the Corporation was Judge, and the Error assigned was, that he had not taken the Oaths pursuant to the Statute 25 Car. 2. by which his Office of Mayor is made void, for not taking the Oath, and by Consequence the Judgment was coram non judice; it was insisted in Support of the Judgment, that this is not assignable for Error, because 'tis contrary to the Record, by which he is admitted to be Judge. Sed per curiam, the Statute makes the Office void, as to Jurisdiction; and therefore this is assignable for Error, tho' contrary to the Record.

2 Lev. 184. T. Jones 81. Where Error may be assigned contrary to the Record. 13 Car. 2. cap. 1.

(4.) But since it hath been adjudged otherwise in a parallel Case. If. Error of a Judgment in an Inferior Court, for that the Sheriff who heard the Cause, and was Judge of the Court, had not taken the Oaths: The Defendant pleaded, that the Oaths were not tender'd to the Sheriff; and upon a Demurrer to this Plea, it was adjudged good, because the Statute requires, that the Oath and Declaration should be tender'd to him to subscribe, and the Tender is traversable.

2 Lev. 242. *Denning* v. *Norris*.

OFFICE.

Saunders *verſus* Owen.

2 Salk. 467. 5 Mod. 386. Of a *Cuſtos Rotulorum* and a Clerk of the Peace.

(1.) IN arguing this Caſe, which was upon a Writ of Erroꝛ to reverſe a Judgment in Aſſiſe foꝛ the Office of Clerk of the Peace to the Juſtices of Kent, it was held, that Anno 12 Rich. 2. The Clerk of the Peace was called, the Clerk of the Juſtices, from which it may be inferred, that at that Time there was no Cuſtos Rotulorum, but all Proceedings at the Seſſions were kept by the Juſtices; that when by the Statute * 34 Ed. 3. their Proceedings came to be recoꝛded, it was then neceſſary to have a proper Officer who ſhould be reſponſible foꝛ the Rolls, and this was the Cuſtos Rotulorum, who then had Power to appoint a Deputy, as incident to his Office, and this is the Clerk of the Peace: But this being found to be a profitable Office, the King did uſually diſpoſe it; therefoꝛe to prevent ſuch Diſpoſals, this Office was annexed to the Cuſtos Rotulorum by the Statute 37 H. 8. and ſince that Statute the Cuſtos hath always put in the Clerk of the Peace, appointing him to hold the ſame durante placito ſuo; ſo that he was removeable at Will, till by the Statute * 1 Will. 3. he had a moꝛe fixed Eſtate, which is quam diu ſe bene geſſerit.

* 34 Ed. 3. cap. 1.

* 1 Will. 3. cap. 21.

Sir Robert Atkins *verſus* Mountague.

1 Chan. Rep. What Office cannot be granted in Reverſion.

(2.) ELeanor, Queen Dowager of H. 3. endowed St. Catharine's Hoſpital near the Tower, reſerving to her ſelf, Et Reginis Angliæ nobis ſuccedentibus plenam poteſtatem of providing a Maſter thereof: The Queen Dowager in the Reign of Car. 2. nominated a Maſter, and Queen Conſort taking that Nomination to be void, ſhe nominated another; it was inſiſted, that ſuch a deſultoꝛy Inheritance as this was, (viz.) Reginis Angliæ nobis ſuccedentibus, could not be good by Charter, without an Act of Parliament. But per Curiam, This is very true, if it had been a Gꝛant of Advowſon in Eſſe, oꝛ of Lands, becauſe he who had a Right could not always know againſt whom to bꝛing his Action; but

but of a Patronage newly founded there can be no precedent Right, therefore it may be limited at Pleasure, like a Rent de novo.

(2.) It was held, that this Office of a Master could not be granted in Reversion, and that the Right of granting it was in the Queen Dowager and not in the Queen Consort, unless there was no Queen Dowager.

Anonymus.

(3.) PER Curiam: The Office of Marshal of the King's Bench cannot be granted to one for a Term for Years absolutely, because in such Case it might go to an Executor or Administrator.

Office of Marshal of *B. R.* cannot be granted for a Term for Years.

But it may be granted to one for ninety-nine Years, if he shall so long live, because there can be no Inconvenience in such a Grant, and the present Marshal succeeded Sutton by Vertue of such a Lease.

see acc. 9. Co. 95. & my notes there.

Godolphin *versus* Tudor. Mich. 3 Annæ.

(4.) SIR William Godolphin being Auditor of Wales for Life, made the Defendant his Deputy, quam diu se bene gesserit, and by Articles of Agreement between them, he the said Defendant, in Consideration of the said Deputation, did covenant to pay to Sir William Godolphin 200l. per Annum, and to save him harmless, &c. and entered into a Bond for Performance of those Articles; and in an Action of Debt brought on that Bond, the Breach assigned was for Non-payment of 200l. per Annum for so many Years; the Defendant pleaded the Statute * of Ed. 6. there was a Replication, and a Rejoinder and Demurrer: And per Curiam, this is an Office within the Statute, but adjudged, that where the Salary is certain, in such Case, if the Principal maketh a Deputation, reserving a lesser Sum out of that Salary, such Deputation is good notwithstanding the Statute, so if the Profits are incertain arising from Fees; if the Principal makes a Deputy, reserving a Sum certain out of the Fees and Profits of the Office, 'tis good; for in those Cases, if the Fees will not answer the Reservation, the Deputy is not to pay: And tho' a Deputy, by his Constitution, is intrusted with the whole Office of his Principal, yet he hath no Right to the Salary or Fees, for they still belong to the Principal; so that whatever he reserves to be paid out of them, is only a Reservation of what was his before, and giving away the Surplus to another; but where the Reservation or Agreement is to pay generally, but not out of the

Mod. Cases 234. Where a Deputation is good, where not.

* 5 & 6 Ed. 6. cap. 16.

Profits, the Sum reſerved muſt be paid at all Events, and in ſuch Caſe 'tis void by the Statute.

Hutchins *Serjeant's Caſe.* Paſch. 5 Will. III.

King's Serjeant made Commiſſioner of the Great Seal, his Patent as King's Serjeant is determined.

(5.) HUtchins being made King's Serjeant by Patent, during Pleaſure, with a Salary of 40l. per Annum, was afterwards made one of the Commiſſioners of the Great Seal, which Commiſſion being afterwards diſſolved, the Queſtion was, whether he ſhould ſtill take Place as King's Serjeant; and by the Opinion of all the Judges, his Patent of King's Serjeant is determined, becauſe his Commiſſion put him into an Office of Judicature, which is inconſiſtent with the Service and Duty of his Office to be perfoꝛmed as King's Serjeant, and 'tis the ſame as if he had been made Loꝛd Keeper oꝛ a Judge.

2 Vent. 270. Where an Archdeacon forfeits his Right to grant the Office of a Regiſter, the King ſhall have it.

(6.) If an Archdeacon foꝛfeits his Right to grant the Office of Regiſter, per 5 Ed. 6. againſt the Sale of Offices, the King ſhall take the Advantage of that Foꝛfeiture without Office found, foꝛ it was neither in the Archdeacon noꝛ in the King as an Eſtate, but only a Power to nominate to the Office; 'tis like a Thoſe in Action, and the preſent Vacancy is a Chattel ſeparate from the Inheritance.

2 Lev. 151. Offices in Fee are not within the Statute 5 & 6 Ed. 6.

(7.) Tenant for Life of the Bailiwick of the Savoy from the Crown, made a Leaſe thereof foꝛ a Year to an Under-Deputy, and adjudged good; foꝛ by the Statute 5 & 6 Ed. cap. 16. all Offices of Fee are excepted, and ſo are all Sub-grants and Sub-demiſes thereof.

1 Roll. Rep. 274 Conſtable may make a Deputy.

(8.) In falſe Impriſonment, the Defendant juſtified as Deputy to a Conſtable; it was objected againſt this Plea, that a Conſtable could not make a Deputy, foꝛ he is ſwoꝛn to his Office, and cannot give his Oath to his Deputy: Sed per Curiam, a Conſtable is but a miniſterial Officer, therefoꝛe he may make a Deputy, foꝛ he may be ſick, and ſo not able to execute his Office in Perſon, but Returns muſt be made in the Name of the immediate Officer, and ſo they muſt in all miniſterial Offices, but not in judicial.

ORDERS.

Harriſon *verſus* Lewis.

(1.) MOved to quaſh an Order made at the Quarter-Seſſions in Coventry; the Caſe was, Lewis, with his Wife and Children were ſettled in the Pariſh of A. and from thence they removed to the Pariſh of B. where the Husband gained a Settlement; but the Pariſh of A. having given a Certificate to the Pariſh of B. that they (the ſaid Pariſh of A.) would receive them again when-ever Lewis ſhould become chargeable to B. and he now being chargeable, they obtained an Order from two Juſtices to ſend him and his Wife and Children to A. again, which Order was confirmed upon an Appeal to the Seſſions, and he was ſent thither accordingly, but the Order was quaſhed; for tho' it was according to the Agreement made between the two Pariſhes, yet a private Agreement in this Caſe ſhall not alter the Law.

A poor Man coming with a Certificate into a Pariſh ſhall not go back to the Pariſh who certified, if he hath gained a Settlement elſewhere.

The King verſus Pariſh of St. Nicholas *in* Abingdon.

(2.) ONE Dickinſon was an Inhabitant of the Pariſh of St. Helens in Abingdon, where he had four Children, and removed from thence into the Pariſh of St. Nicholas, where he lived ſome Time, and was taxed to the Poor there, but was removed back to St. Helens before he paid the Tax, and there he died, afterwards his Children were by Order of the Juſtices removed into the Pariſh of St. Nicholas, for that their Father had gained a Settlement there, by being * taxed to the Poor, and this by Vertue of the Statute 3 & 4 Will. 3. But per Curiam, there muſt be Paying as well as Taxing, to make a Settlement by that Statute.

Taxing alone, without paying, will not make a Settlement.

* Statute 3 & 4 Will. 3.

The

The King verſus Inhabitants of Winſly.

Seſſions muſt either affirm or reverſe an Order. *Poſtea* 6. S. P.

(3.) ONE Mary Tully, a poor Woman, was by Order of two Juſtices removed from Beverley to Naſeborough in the Weſt-Riding of Yorkſhire, that being adjudged by them to be the laſt Place of her legal Settlement; Naſeborough appeals to the next Seſſions, and thereupon an Order was made, reciting the Difference between Beverly and Naſeborough, but that it appeared to them, that this Woman was laſt legally ſettled at Winſly, which was a third Pariſh not concerned before, and ſo ſhe was by that Order removed to Winſly, but it was quaſhed, becauſe the Seſſions had no Juriſdiction, but only to affirm or reverſe the Order between the contending Pariſhes, and not to make an Order to charge a third Pariſh.

Wootton Rivers *verſus St.* Peter's Marlborough.

2 Salk. 492. 5 Mod. 149. Objected againſt an Order, that it did not ſet forth, that the Perſon removed did not rent 10 *l. per Ann.* and that it doth not ſay it was made upon the Complaint of the Pariſh-Officers, quaſhed for the laſt Objection. * Cap. 12.

(4.) THIS Caſe is reported in 2 Salk. but it was as followeth, (viz.) An Order was made by two Juſtices to remove a poor Woman from the Pariſh of Wootton Rivers to the Pariſh of St. Peter in Marlborough, that being the laſt Place of her legal Settlement, which Order being removed into B. R. by Certiorari, theſe Objections were made againſt it.

(1.) 'Tis not ſaid that the Woman was Poor, but only that ſhe was lame and likely to become Poor.

(2.) 'Tis not ſaid, ſhe did not give Security, upon giving which ſhe is not to be removed by the Statute * 13 & 14 Car. 2.

(3.) 'Tis not ſaid, that ſhe did not rent a Tenement of 10 l. per Annum.

(4.) The Order was made upon Complaint to the Juſtices, but doth not ſay, upon Complaint of the Church-wardens or Overſeers of the Poor.

But the two laſt Objections were chiefly inſiſted on to quaſh this Order.

Now, as to the Renting a Tenement of 10 l. per Annum: Per Holt Ch. Juſt. before the Statute 13 Car. the Juſtices of Peace removed poor People by Conſequence of Law, upon the Statute 43 Eliz. becauſe 'tis provided by that Statute, that every Pariſh ſhould maintain its own Poor, therefore they conſidered who were properly the Poor of a Pariſh, and thoſe were ſuch as were ſettled a convenient Time in a Pariſh, and that a Month was a convenient Time to make a Settlement: But there being

ſeveral Doubts made about this Matter, therefore to ſettle the ſame, the Statute before mentioned was made; upon which Statute this Queſtion now ariſes (viz.) ſince the Power to remove a poor Perſon being not wholly founded on the Statute 13 & 14 Car. 2. but on the Law as it was before the making that Statute, whether ſuch an Order as would ſerve for a Removal before that Statute, would ſerve ſince, or whether the Statute obliges the Juſtices to alter the Form of their Orders; and this depends upon the Operation of the Statute, whether it was by Way of Juriſdiction or Reſtriction, and upon Searching of Precedents by the Secondary he found, that the Orders before this Statute were all without this Clauſe, and ſo were the Orders ſince, whereupon as to this Point this Order was held good, and if the Fact is, that the Perſon removed doth rent a Tenement of 10 l. per Annum, it ought to be remedied by Way of Appeal to the Seſſions.

But as to the laſt Exception, that this Order was made upon Complaint only, and not upon Complaint of the Churchwardens, &c. this was held fatal; whereupon the Return of the Certiorari was read, and there it appeared, that the Order was made upon the Complaint of the Churchwardens and Overſeers of the Poor, upon which it was urged, that this Omiſſion and Defect in the Order it ſelf, ſhould be ſupplied and made good by the Return of the Certiorari. But per Curiam, no Man can diſturb another coming into a Pariſh, but he or they who have Authority ſo to do; a Complaint ex officio to a Juſtice of Peace, is not ſufficient, for it may be, that the Pariſh is willing, and do deſire to have the Party amongſt them; and if that be the Caſe the Juſtices cannot remove him; and tho' upon the Return of the Certiorari 'tis ſet forth, that this Order was made upon the Complaint of the Churchwardens and Overſeers of the Poor, yet that will not ſupply the Omiſſion in the Order itſelf, becauſe the Juſtices had exerciſed their Authority before the Return was made, and they had no Power to make ſuch a Return; they ſhould only have returned the Order in hæc verba, for which reaſon this Order was quaſhed.

Scrivenham *Pariſh verſus* St. Nicholas.

(5.) AN Order to remove a poor Perſon was quaſhed, becauſe it was not ſaid, that he was Poor, or likely to become chargeable to the Pariſh, &c.

Order quaſhed, for that it did not ſet forth, that the Perſon was Poor, &c.

The King verſus Inhabitants of Oking.

5 Mod. 208. 2 Salk. 473. Where the Husband is ſettled, the Wife and Children muſt likewiſe be ſettled there.

(6.) ONE James Tully, his Wife and Children, were removed, by an Order of two Juſtices, from Oking to Horſwell, who appealed to the next Seſſions, and there an Order was made to ſuperſede the Order of the two Juſtices, and for that it did not appear to them, that the ſaid James Tully (ſaying nothing of his Wife and Children) had a Settlement at Horſwell, therefore they order him, and his Wife and Children, to be removed to Oking: Theſe Orders being removed by Certiorari, it was objected, that the Order appeared to be made by the Juſtices, &c. at the Seſſions holden for the County of Surrey at Kingſton upon Thames, and it doth not appear by the Order, that Kingſton was in the County of Surrey; but the Word Surrey being in the Margin, this Objection was over-ruled: The next Objection was, that it doth not appear by the Seſſions Order, but that the Wife and Children might be ſettled at Horſwell, for it only ſets forth, that James Tully had no Settlement there, which may be true, for he may be a Vagabond, and yet his Wife and Children may be ſettled there, the one by having a Freehold, and the other by being Apprentices; but per Curiam, this Exception was diſallowed; for wherever the Husband is ſettled, there the Wife muſt likewiſe be ſettled. In the next Place it was objected, that the Seſſions having only Power to * repeal or affirm, but not to ſuperſede the Order of two Juſtices. Per Curiam, Superſede is not a proper Word, there is a Difference between a Superſedeas and a Repeal; a Commiſſion of Oyer and Terminer may be ſuperſeded, and revived by a Procedendo without granting a new Commiſſion, but that cannot be done in Caſe of a Repeal; yet this Word is commonly uſed amongſt Juſtices of Peace upon ſuch Occaſions; therefore they would not quaſh it, but referred it to a Judge of Aſſiſe.

* Seſſions have Power to affirm or repeal, but not to ſuperſede an Order. *Antea* 3. S. P.

The King verſus St. Ollave's *Pariſhioners.*

Order of Removal ought to be directed to the Officers of both Pariſhes.

(7.) UPON a Certiorari two Orders were returned; the firſt was an Order made by two Juſtices, for the Settlement of a poor Man, Thomas Gill, in ſuch a Place, and the other was an Affirmation of the firſt Order upon an Appeal to the Seſſions: The firſt Order recited, that whereas Complaint hath been made unto us, that Thomas Gill of the Pariſh of St. Ollave, had lately intruded himſelf into the Pariſh of St. George, &c. We adjudge him to be laſt legally ſettled in the Pariſh of St. Ollave; theſe are therefore to require you, and every of you,

to convey the ſaid Thomas Gill to the Pariſh of St. Ollave; and the Order was directed to the Churchwardens and Overſeers of the Poor of the Pariſh of St. Ollave, for which Reaſon it was quaſhed; for the Order ought to be directed to the Pariſh Officers, from whence the Perſon is to be removed, and to the Officers of the Pariſh, who are to receive him only.

Luckington *verſus* St. Auſtin's *Pariſh.*

(8.) THE Caſe was, Simon Howell was ſettled at Luckington in Wilts, but afterwards he and his Wife came into the Pariſh of St. Auſtin in Briſtol, where he lived ſome Time, and had a Child born there, which Child was now under the Age of ſeven Years; the Father went to Sea, and there died, the Mother returned to Luckington, and there ſhe died; two Juſtices made an Order to ſend the Child to Luckington, that being the Place where the Father was ſettled, which Order was confirmed upon an Appeal; but Mr. Northey moved to quaſh this Order of Seſſions, becauſe the Child muſt be ſent to the Place where it was born, unleſs it can be ſent to his Parents, where they are ſettled, which could not be done in this Caſe, becauſe they were both dead.

Where Parents are dead the Child muſt be ſettled where born.

Tudy *verſus* Padſtow. Paſch. 9 Will. III.

(9.) AN Order made by two Juſtices for ſettling a poor Man at ſuch a Place, was quaſhed at the Seſſions; but becauſe it did not appear, that it came before them by Way of Appeal, the Order of Seſſions was quaſhed, for they have not Original Juriſdiction, but it muſt be brought before them by Appeal.

Seſſions have no Juriſdiction but by Appeal.

Bayly's *Caſe.* Hill. 10 Will. III.

(10.) A Maid Servant before the 25th of March 1707, was an Inhabitant legally ſettled at Overton in Hampſhire, and then contracted with one John Orpewood, an Inhabitant of Steventon, for ſo much Wages, to ſerve him from the ſaid 25th Day of March till Michaelmas following, which ſhe did accordingly, and then made a new Contract with the ſame Maſter, to ſerve him for a longer Time, and accordingly did ſerve him upon that Contract till April following, in all above a Year. And per Curiam, tho' this was not an entire Contract for a Year, yet it gained her a

Where the Service was for more than a Year, tho' not upon one Contract, yet 'tis a Settlement.

Settlement at Steventon, according to the Statute 9 Will. 3. cap. .

The Queen versus Branworth. Mich. 3 Annæ.

Mod. Cases 240. A Man is not indictable for being a Vagrant. * Cap. 27.

(11.) BRanworth was indicted at Portsmouth, for wandring up and down there to sell Wares as a Petit Chapman; and it was urged, that any Pitit Chapman is a Vagrant within the Statute 13 Eliz. if not exempted and qualified within the Statute * 9 & 10 Will. 3. and that the Statute before mentioned did not extend to Boroughs or Corporate Towns, so that as to these Places a Petit Chapman remained as he was before (i. e.) a Vagrant, Sed per Holt Ch. Just. A Man was not indictable for being a Vagrant; but if he was suspected to be, or really was, a loose and disorderly Person, he might be taken up and bound to his good Behaviour, and by the Statute of Labourers, he might be put to Work, or be compelled into Service.

Spencer's *Case*. Hill. 8 Will. III.

Appeal must be to the next Sessions.

(12.) AN Order was made by two Justices, to remove Spencer from Hinckley in Leicestershire to Rochby in Warwickshire, who appealed, and at the adjourned Sessions, the two Parishes agreed to put off the Determination of the Cause till the next Sessions, which Sessions vacated the Order of the two Justices; and now it was moved, to set aside that Order, because the Appeal ought to be at the next Sessions, per Statute 13 Car. 2. and 3 & 4 Will. 3. there to be finally determined; and for this Reason it was quashed.

Elizabeth Ashley's *Case*. Pasch. 9 Will. III.

2 Salk. 479. Order made by two Justices, tho' not of the Division, good.

(13.) TWO Orders were removed by Certiorari, the Return whereof was quashed, because the Return in the Schedule annexed to the Writ, was not made by two Justices, but by the Clerk of the Peace, who was not the Person to whom the Certiorari was directed, and thereupon a new Certiorari was granted, which being returned and filed, it was objected, that the Order made by two Justices, to remove the poor Man, &c. was naught, because it was not said, that it was made by two Justices of the Division, &c. according to the Statute 13 & 14 Car. 2. But per Curiam, the Statute as to this Matter is only directory, 'tis not restrictive or qualificatory, as the Word Quorum is.

Cumner *Pariſh verſus* Milton *Pariſh*. Trin. 2 Annæ.

(14.) A Man ſettled at Cumner, and having ſeveral Children born in that Pariſh, afterwards removed to Milton with his Children, and rented a Farm of 10l. per Annum there, by which he gained a Settlement in the Pariſh of Milton, and becoming very Poor, his Children born in Cumner, were by an Order of two Juſtices ſent thither, (viz.) thoſe who were under ſeven Years old, the Juſtices apprehending that the Place of their Birth was the Place of their lawful Settlement, and this Order being removed into B. R. by Certiorari, it was inſiſted to maintain the Order, that the Children had gained a Settlement in Cumner by Birth, which was not altered or defeated by any ſubſequent Act of their Father, in gaining a Settlement at Milton, for his Children were with him there only as Nurſe Children, and his Settlement ſhall not be the Settlement of his Children: But per Holt Ch. Juſt. the Place where a Baſtard is born is the Place of his Settlement, unleſs there is ſome Trick to charge the Pariſh; but the Place where legitimate Children are born is not the Place of their Settlement, for let that be where it will, the Children are ſettled where their Parents are ſettled, as for Inſtance, if the Father is ſettled in the Pariſh of H. but goes to work in the Pariſh of B. and before he gains any Settlement there, has a Son born in the Pariſh of B. and then dies, this Child ſhall be ſent to the Pariſh of H. for 'tis not the Birth, but the Settlement of the Father that makes the Settlement of his Child; and if the Father hath gained a new Settlement for himſelf (as he had done in the principal Caſe) he hath likewiſe gained a new Settlement for his Children, who do not go with him to his new Settlement as Nurſe Children, but as Part of his Family: And to what Purpoſe is the Father, upon coming into a new Pariſh, to give Notice of the Number of his Family, but only upon a Suppoſition that they may gain a Settlement there: But if a Man is ſettled in the Pariſh of H. and has Children born there, and dies, and afterwards the Mother of theſe Children marries a Husband, who is ſettled in another Pariſh, the Children ſhall go along with her, not as Part of her Family, but as Nurſe Children, to be maintained at the Charge of the Pariſh where they were born, and where their Father, whilſt living, was ſettled, and to that Pariſh they may be ſent after ſeven Years old, as to the Place of their lawful Settlement; for this accidental Settlement of their Mother, which was only by the Marriage with a ſecond Husband, and as ſhe is now become one Perſon with him, ſhall not gain a Settlement for her Children.

Mod. Caſes 87. 2 Salk. 528. Children which are legitimate are ſettled with their Parents, and not where born.

Mynton *Pariſh verſus* Stony Stratford. Mich. 13 Will. III. B. R.

2 Salk. 527. An Order which is diſcharged on an Appeal, binds only the contending Pariſhes, but if 'tis affirmed on an Appeal, 'tis concluſive. * *Poſtea* 21. S. P.

(15.) A Poor Man was ſent by an Order of two Juſtices to Mynton, and upon an Appeal to the Seſſions, that Order was diſcharged; then by another Order of two Juſtices, he was ſent to Stony Stratford, and upon an Appeal to the Seſſions, that Order was confirmed: Afterwards he was by another Order of two Juſtices, ſent to Mynton again; and per Curiam, this laſt Order is illegal, for per Holt Ch. Juſt. where an Order is diſcharged upon an Appeal, it binds only between the contending Pariſhes, but where an Order is * confirmed upon an Appeal, 'tis concluſive to all Parties, for 'tis an Adjudication, that the Place to which he was ſent is the laſt Place of his legal Settlement, which can never be avoided but by the Pariſh againſt whom it was made; and that a Pariſh in Reputation is chargeable, if it hath Officers, as Church-wardens, &c.

Anonymus. Mich. 10 Will. III. B. R.

Order to remove a poor Man and his Family, quaſhed.

(16.) An Order made to remove a poor Man and his Family from H. to C. was quaſhed, becauſe all might not be removable; for if a Widow have Children in a Pariſh where ſhe is ſettled and marrieth a Husband ſettled in another Pariſh, if thoſe Children are above ſeven Years old, they are not to be removed.

Tracy *verſus* Talbot. Trin. 3 Annæ, B. R.

Mod. Caſes 214. 2 Salk. 532. Of Houſes ratable to the Poor-Tax.

(17.) A Man took Part of an Houſe in the Pariſh of D. and was rated as an inhabitant of that Pariſh, &c. and a Diſtreſs was had for that Rate; and in Replevin it was held per Holt Ch. Juſt. that if two Houſes are inhabited by two Families, and there is but one Common Door where both enter, yet, in reſpect of their Original, which is ſeveral, they continue ſeveral Houſes, and are ſeverally ratable to the Poor, and if one Family goes away, the Part where he dwelt ſhall be taken as an empty Houſe, but if one Houſe is divided by Partitions, and inhabited by ſeveral Families, as for Inſtance, if the Owner dwells in one Part, and a Stranger in another Part, theſe are likewiſe ſeveral Tenements, and the Inhabitants thereof ſeverally ratable to the Poor whilſt they dwell in thoſe ſeveral Tenements; but if the Stranger removes out of his Part, and his Family goes away,

way, then the Whole becomes an entire Tenement, and the Poſſeſſion thereof is devolved on the Owner, and he is ratable for the Whole as one Tenement, &c.

The King verſus Ricelip.

(18.) THIS Caſe is reported in 2 Salk. but not as 'tis here reported, (viz.) A poor Man was removed from Harrow to Ricelip by an Order of two Juſtices, which Order was * confirmed upon an Appeal to the next Seſſions, ſo that now he became ſettled at Ricelip; afterwards the Pariſhioners of Ricelip diſcovering that Hendon was the Place of his Settlement, got an Order from two Juſtices to remove him thither; and upon a Certiorari to remove that Order into B. R. the Queſtion was, whether after an Adjudication upon an Appeal, Ricelip is eſtopped to ſay, that is not the laſt Place of his legal Settlement, and adjudged they are, for if Ricelip had not been the laſt Place of his Settlement, they could not have ſent him there, but he would have been ſent back to Harrow, who was firſt poſſeſſed of him, ſo that this is in Effect but the ſame Queſtion again, which hath been already determined; and there muſt be an End put to it: If a Man be adjudged by two Juſtices to be the Father of a Baſtard Child, he is for ever concluded to ſay the contrary ſo long as that Order ſtands in Force, and 'tis an Eſtoppel to all Men to ſay the contrary, but any Man may ſay he is the Father.

2 Salk. 524. 5 Mod. 416. Order confirmed upon an Appeal is concluſive. * *Antea* 15. S. P.

The Queen verſus Corbett.

(19.) THE Juſtices made an Order, that T. S. ſhould pay E. G. ſo much Money for Labour and Work done, but did not ſet forth, that E. G. was Servant to the ſaid T. S. and for that Reaſon it was quaſhed, for the Juſtices have only an Authority to Order Payment of Wages to Servants in * Husbandry; but by this Order it might be for Labour and Work done as a Carpenter or Maſon in Building.

Mod. Caſes 91. Juſtices have Power to make an Order for Wages, but not for work done. * Jones 47.

The Queen verſus London.

(20) AN Order recited, that two Men (naming them) were retained by Mr. London, the King's Gardiner, to work in the Gardens in Hampton-Court, at ſo much per Diem, and that they worked ſo many Days there, for which ſo much was due, and which Mr. London was ordered to pay; this Order being removed from Hicks's-Hall into B. R. it was quaſhed, becauſe the

Order to pay ſo much for Wages generally, ſhall be intended in Husbandry.

* Cap. 4. the Justices have no Power by the Statute * 5 Eliz. to order Payment of Wages to any Labourers, other than those who are employed in Husbandry; and the Reason is, because by Vertue of that Statute the Justices may compel Men to work in Husbandry, and therefore 'tis reasonable that they should enforce the Payment of their Wages, especially since by the same Statute they have Power to settle the Wages: Et per Curiam, where an Order is made for Payment of Wages generally, it shall be intended Wages in Husbandry; but where it appears to be otherwise, as it did in this Order it self, it shall be quashed.

OUTLARY. *See* Pleas 16.

Raym. 17. Hard. 101. *See* Britton *v.* Cole. (1.) By an Outlary all personal Chattels of the Person outlawed are vested in the King by Forfeiture, but real Chattels or Freehold Estates are not vested in the King till after Inquisition found.

(2.) Therefore, if the Person outlawed do either alien or make a Lease before Inquisition, the King hath lost the Pernancy of the Profits.

1 Mod. 224. Sid. 43. (3.) Outlary is a good Plea to an Audita querela, even upon that Judgment upon which the Party was outlawed, because the Audita querela is not to defeat the Judgment but the Execution.

(4.) But if a Writ of Error or Attaint is brought upon the Judgment on which the Party is outlawed, in such Case Outlary is no Plea, for by these the Judgment it self is to be reversed and defeated, and then the Outlary, which is but a Superstructure, falls; for the Rule is, Non admittitur exceptio ejus cujus petitur dissolutio.

Hard. 22. (5.) An outlawed Person was sued in the Exchequer by Bill to discover his real and personal Estate for the Benefit of the King; and upon a Demurrer to the Bill, because the Defendant is not bound to accuse himself, this Demurrer was over-ruled, because the King has a Title by the Outlary, which is quasi a Judgment for him.

(6.) A Person outlawed shall never be admitted to assign Errors, till he yeilds himself in Execution, for he must give Obedience to the Law before he shall have the Benefit of it; and he shall not have a Writ of Error, because in such Case he will have a Sight of the Record, and if there are Errors in it, then he will appear, otherwise not: Now the Outlary is an Attainder, and therefore he ought to appear in Person, and submit himself to his Trial; for being attainted, it must be ex gratia, if he is admitted to assign Errors before.

(7.) Nota, At Common Law, there was no Process of Outlary, but in Cases of Felony; and therefore, as by committing Felony a Man forfeited all his Lands, Goods, and Chattels, so by an Outlary for Felony, at this Time, he forfeits the same. Co. Lit. 128.

(8.) But Process of Outlary in personal Actions is only by the Statute, in which Case the Goods and Chattels of the Person are only liable, for those were only chargeable in personal Actions, and so they are by an Outlary in those Actions, (viz.) they are forfeited to the King, and he shall likewise have the Pernancy of the Profits of the Chattels real; but this seems by a Consequence only, for that the Party being extra legem, is thereby become incapable to take the Profits himself.

(9.) A Merchant having 500 l. Stock in the East-India Company, was outlawed before Judgment at the Suit of W. R. the King upon Inquisition and Seisure, grants this Stock to the said W. R. and that he might sue for it in his own Name, W. R. gets the Stock transferred to him, and then the Merchant reversed the Outlary, and the King granted him Restitution, de omnibus quibus nobis non est responsum. Et per Curiam, this shall not restore the 500 l. Stock, because the Grant was executed and vested in W. R. and as to that Matter the King was answered. 2 Lev. 49.

(10.) Case, &c. upon a Quantum meruit for Meat, Drink, &c. The Defendant pleaded an Outlary in Bar to the Action, setting forth, that as Exigenda posita fuit, & utlagat', &c. & ea ratione, &c. debita juris forma waiviata fuit & existit; and upon Demurrer to this Plea it was insisted, that this Outlary could not be pleaded in Bar to the Action, it being an Assumpsit upon the Quantum meruit, because till the Things are valued, the Debt is incertain, and by Consequence cannot be forfeited: It was doubted before Slade's Case, whether a Debt upon a Simple Contract could be forfeited by an Outlary; but in that Case it was adjudged a good Plea, because the Consideration 2 Vent. 282.

created

created a Debt, tho' it was not reduced to a certain Sum. Outlary hath been held a good Plea to an Action of Trover, and even in Bar to that Action, tho' all lies in * Damages; but in the Principal Case the Court doubted, whether debita juris forma waviata existit, was too general or not.

* 3 Leon. 205.

1 Lev. 33. (11.) In a Special Verdict in Ejectment, the Case was, W. R. was outlawed in a personal Action, and afterwards levied a Fine, and the King seised the Lands in the Hands of the Cognisee; and per Curiam, the Seisure had been good, if it was before the Fine levied, but not after, for then the Cognisee shall hold against the King.

OYER. *See* DEEDS.

PARDON.

The King versus Weedon, *& al'.* Mich. 12 Will. III.

Difference between a General and and a Special Pardon.

(1.) A Conviction of Barretry renders a Man infamous, and incapable of being a Witness, but a General Pardon will restore him. Et per Holt Ch. Just. The Difference between the Effects of the King's Special Pardon, and a General Pardon, is this, (viz.) wherever the Disability is Part of the Judgment by Act of Parliament, as in Conviction of Perjury upon the Statute, there the King's Pardon cannot remove that Disability, but a General Pardon may; but where the Disability is only consequential, as upon an Attainder, and no Part of the Judgment, there the King's Pardon will take it away.

Dr. Groanvelt's *Case.* Hill. 8 Will. III.

(2.) THE Censors of the College of Phisicians in London have Power by their Charter, to fine and imprison for male Practice in Phisick, and this Charter being confirmed by Act of Parliament, they accordingly did fine and imprison Dr. Groanvelt, for administring unwholsome Pills and Medicines; and in this Case it was held per Holt Ch. Just. and the Court, that the King is Creditor pœnæ, and that all Fines for Offences belong to him; and accordingly several Lords of Manors have the Fines for all Offences within their Seigniories, But 'tis from the Grants of the King, and that he may Pardon the Offence and remit the Crime, for this is a Prerogative which he cannot part withal; for as he hath the publick Revenge in his Hands, so 'tis necessary, and for his Honour, to have a Power of mitigating or remitting the exercise of it.

1 Salk. 144, 200, 263, 396. All Fines for Offences belong to the King.

Anonymus.

(3.) THE King may pardon Felony; but then by the Statute * 10 Ed. 3. he who will have the Benefit of such Pardon must within three Months after find Sureties for his Good Behaviour by Recognisance to be returned into the Chancery; if he doth not, then the Pardon is void; but this Statute is now repealed by the Statute 5 & 6 Will. 3. by which 'tis provided, that where a Pardon is pleaded by any Person for Felony, the Judge before whom 'tis pleaded, may at his Discretion remand or commit such Person to Prison, there to remain till he or she shall enter into a Recognisance, with two sufficient Sureties, for his or her being of the Good Behaviour for any Time under seven Years; and that an Infant or Feme Covert pleading a Pardon, shall find two such Securities, who shall enter into a Recognisance, as aforesaid.

* Cap. 3. The King may Pardon Felony, and he who pleads it must find Security for good Behaviour.
* Cap. 13.

(4.) If a Man commit Felony and Inquisition is taken, and then comes a General Pardon, yet the Forfeiture remains unless there are Words of Restitution.

Sid. 168.

(5.) Where a Man is guilty of Simony, and afterwards there is a General Pardon for all Offences which the King can Pardon, yet the Parson so guilty may be deprived, because Simony is malum in se.

Sid. 170,222. (6.) So if a Man marries his Sister, he cannot be pardoned a parte ante; yet he may be divorced and punished, if he cohabits with her afterwards, for the subsequent Cohabitation is a new Crime.

1 Vent. 217. (7.) Where a Man is indicted for Treason a Pardon is good, tho' it doth not mention the Indictment; but 'tis not so where the Defendant is indicted for Murder, for by the Statute 27 Ed. 3. cap. 2. the Pardon must recite the Indictment.

1 Vent. 134. 1 Lev. 26. (8.) Where a Statute Pardon contains Exceptions in the Body of the Act, he who pleads such Statute, to intitle himself to the Benefit thereof, must aver himself not to be a Person excepted; but where the Exceptions follow in a distant Clause by Way of Proviso, he needs not.

PARLIAMENT.

1 Mod. 242. Difference between a Prorogation and an Adjournment. (1.) A Prorogation of the Parliament is always by the King, and in this Case the Sessions must begin de novo; but an Adjournment is by each House, and the Sessions continue notwithstanding such Adjournment.

Sid. 245. Where an Order of the House is determined on a Prorogation. (2.) An Order was made to apprehend W. R. and to take him into Custody, for arresting a Person who claimed a Privilege under a Peer, and this Arrest was six Days after a Prorogation; but upon an Habeas Corpus the Person was discharged, because the Order determined upon the Prorogation as effectually as it would have done upon a Dissolution, and so 'tis of all Things executory and imperfect, except Writs of Error or Scire Facias; but if the Person had been taken by the Serjeant at Arms before the Prorogation, and that he must be, because it might happen that the Parliament may be dissolved, and so the Party may continue in Prison for ever.

Where a Man may be punished after Parliament is ended. (3.) If an Offence be committed criminally in Parliament, the Person may be punished in B. R. after the Parliament is ended; for interest reipublicæ ne maleficia maneant impunita.

(4.) If a Parliament is assembled, and several Orders made, and Writs of Error brought in the House of Peers, and several Bills agreed on and none signed, this is but a Convention, and no Parliament, or Sessions of Parliament; but every Session in which the King Signs a Bill, is a Parliament, and so every Parliament is a Session, but not è converso. Hutt. 61. 1 Roll. Rep. 29.

(5.) In the House of Peers their Privilege begins from the Teste of the Writ of Summons, and upon every Session and Prorogation their Privilege is for twenty Days before, and twenty Days after a Sessions, this being Time enough for going to and coming from any Part of England. 2 Lev. 72.

(6.) A Writ of Error returnable ad proximum Parliamentum, is ill, unless the Prorogation is to a certain Day. 1 Vent. 266.

PARTITION. *See* Jointenants 15.

PAWN.

(1.) Where Goods are pawned generally, without any Day of Redemption, and the Pawner dies, the Pawn is absolute and irredeemable; but if the Pawnee dies, 'tis not so. Noy 157. 1 Bulst. 9.

(2.) Where Goods are pawned, redeemable at a Day certain, the Pawnee in Case of Failure of Payment at the Day, may sell them. 1 Roll. Rep. 215.

Anonymus. Paſch. 5 Will. III.

Where a Pawn-broker may be indicted.

(3.) PER Holt Ch. Juſt. Where a Pawnee refuſes upon Tender of the Money, to redeliver the Goods, he may be indicted, becauſe being ſecretly pawned, it may be impoſſible to prove a Delivery for Want of Witneſſes, in Caſe he ſhould bring an Action of Trover for them.

Coggs *verſus* Bernard. Trin. 2 Annæ.

1 Salk. 26.

(4.) There is a Caſe reported by this Name in 1 Salk. which ſee, for it doth not relate to what follows: Per Holt Ch. Juſt. Vadium, a Pledge or Pawn, in which Caſe the Pawnee hath a Property in it, for the Thing is a Security to him, that he ſhall be repaid the Money lent on it.

(5.) Now, if the Thing pawned may be the Worſe for uſing, as Clothes, &c. the Pawnee cannot uſe them; but if it will not be the Worſe, as Jewels, &c. he may uſe them, but then it muſt be at Peril; for if the Pawnee is robbed, he is liable to the Pawner, becauſe the Pawn is ſo far in the Nature of a Depoſitum, that it cannot be uſed but at the Peril of the Pawnee, and it was the Uſing that occaſioned the Loſs.

(6.) But if the Pawn is laid up, and the Pawnee robbed, he is not anſwerable.

(7.) If the Pawn is of ſuch a Nature that the Keeping is a Charge to the Pawnee, as a Cow or an Horſe, the Pawnee may Milk the one, or ride the other, and this is as a Recompence for his Keeping.

(8.) If a Creditor takes a Pawn, he is bound to reſtore it upon the Repayment of the Debt, but if his Care of Keeping it be exact, and the Pawn is loſt, he ſhall be excuſed, for there was no Default in him.

(9.) And where the Pawn in ſuch Caſe is loſt, the Pawnee hath ſtill his Remedy againſt the Pawner for the Money lent, for the Law requires nothing extraordinary of the Pawnee, but only that he ſhall take what Care he can to reſtore the Goods, upon Payment of the Money.

(10.) Therefore if a Pawn is loſt before Tender of the Money, the Pawnee is not liable, unleſs there was an apparent Default

in him; but if after the Money tendered, the Pawnee will keep the Goods, and they are loſt, the Pawnee ſhall be liable, becauſe his Property is determined by the Tender, and he is afterwards become a wrongful Detainer; and he who keeps Goods wrongfully muſt anſwer for them at all Events at his own Peril, for his wrongful Detainer was the Occaſion of the Loſs.

(11.) Where a Man pawns Goods for Money lent, and afterwards a Judgment is had againſt the Pawner at the Suit of one of his Creditors, the Goods in the Hands of the Pawnee ſhall not be taken in Execution upon this Judgment until the Money is paid to the Pawnee, becauſe he had a qualified Property in them, and the Judgment-Creditor had only an Intereſt. 3 Bulſt. 17.

(12.) And this is agreeable to Southcote's Caſe, ſ. Where a Man delivers Goods to another to keep ſafely, and they are afterwards ſtolen, he ſhall be anſwerable for them in an Action of Detinue; becauſe, when they were delivered to him, he undertook to keep them ſafely, and therefore he ought to keep them ſo at his Peril, tho' he hath no Reward; but if he take Goods to keep them as his own, and they are afterwards ſtolen, he ſhall not be liable; the ſame Law if they are pawned to him, becauſe he hath a qualified Property in them. 4 Rep. 83.

PERJURY.

Buxton *verſus* Gouch. Paſch. 5 Annæ, B. R.

(1.) IN this Caſe it was held per Curiam, that Perjury was puniſhable at Common Law, that if it relate to Juſtice, 'tis puniſhable by the Statute; but if it relate to a ſpiritual Matter in the Spiritual Court, it may be puniſhed there. Perjury, how puniſhable.

(2.) That it takes its Name from perverting Juſtice, therefore it muſt be judicial; and a falſe Oath in a Court of Juſtice is more odious than elſewhere. Style 336.

(3) 'Tis

5 Eliz. cap. 9. Sid. 106.

(3.) 'Tis an Offence for which the Party may be indicted, either at Common Law or upon the Statute 5 Eliz by which the Punishment is enlarged, but the Nature of the Offence is not altered by that Statute; and in many Cases an Indictment will lie at Common Law when it will not lie upon the Statute, as for Instance, a Man may be indicted at Common Law for a false Affidavit taken before a Master in Chancery, but not upon the Statute; for this is not Perjury within the Meaning of that Statute, for that must be in a Matter relating to the Proof of what was in Issue.

Bulst. 322. 1 Cro. 352. 3 Cro. 137.

2 Cro. 212. 3 Inst. 164.

(4.) So where a Witness for the King swears falsly, he cannot be indicted upon the Statute, but he may at Common Law. 2 Cro. 120. Peirce's Case.

Yel. 120.

(5.) A false Oath formerly taken in the Court of Requests, in a Matter concerning Lands, was not indictable, because that Court had no Jurisdiction in such Cases.

Cro. Eliz. 105.

(6.) Indictment of Perjury was, quod tacto per se sacro Evangelio falso deposuit, &c. this was adjudged ill, because it was not fully alledged, that he was sworn.

3 Cro. 147, 148. * 3 Cro. 137.

(7.) Another Indictment was held ill, because it did not alledge that the Defendant voluntariè deposuit; and * another was likewise adjudged naught, because the Oath did not relate to the Point in Issue.

Sid. 90.

(8.) Where the Plaintiff loses his Action by a false and perjured Witness produced on the Part of the Defendant, in such Case he (the Plaintiff) cannot have an Action against that Witness, till he is indicted and convicted, unless it was such a Perjury, or in such a Court, that an Indictment would not lie for it.

PIDGEONS. *See* Nusance 3.

Pleas not certain, and wanting full Defence.

Hole *verſus* Burgoigne. Paſch. 6 Will. III.

(1.) DEBT for 10 l. ſhewing, that in Conſideration he had paid the Defendant the Rent due to him, (viz.) 5 l. he (the Defendant) by his Deed did covenant to ſave him (the Plaintiff) harmleſs, againſt W. R. who claimed the Lands, and then ſets forth, that W. R. did implead him * inter alia, in the Court of Exchequer, in an Action of Debt to recover this 5 l. and upon a Demurrer to this Declaration, it was held ill, becauſe the inter alia implacitavit, was too general.

Plea *inter alia*, not good.

* *Poſtea* Rent 1 S. P.

(2.) Want of Defence is only Matter of Form, and aided upon a General Demurrer.

Want of Defence is only Form.

(3.) The Defendant venit & defend' vim & injuriam quando, &c. and imparled Specially, with ſalvis omnibus advantagiis & exceptionibus; it hath been held, that after this he cannot * plead Privilege, becauſe that would be to ouſt the Court after a full Defence; but in Hardres 'tis held otherwiſe, becauſe a claim of Privilege doth not ouſt the Court of Juriſdiction.

* Sid. 318.

* Hard. 565.

Bringloe *verſus* Morriſon. Hill. 27 Car. II. B. R.

(4.) IN Treſpaſs, for Taking his Horſe and riding him immoderately; the Defendant pleaded, that he took the Horſe by Licence, and gave no Anſwer to the Immoderate Riding, yet adjudged good, for the Giſt of the Action is the Taking, and the immoderate Riding is only an Aggravation of the Treſpaſs.

Plea not Anſwering the Declaration, but only Part of it, yet good.

Sheppard

Sheppard *verſus* Taylor. Paſch. 9 Will. III.

How a Judgment in an Inferior Court-Baron is to be pleaded.

(5.) IN Replevin for ſix Diſhes; the Defendant juſtified under a Judgment in a Court-Baron, and a Levari facias awarded thereon, by Vertue whereof he took the Diſhes; and upon a Demurrer to this Plea it was adjudged ill; becauſe an Execution upon a Judgment in a Court-Baron ought not to be by Levari facias, but by Diſtringas, unleſs there is a ſpecial Cuſtom for that Purpoſe; beſides, the Plaintiff ſhould not have begun with Judgment, but with the Plaint enter'd, and taliter proceſſum fuit ſuperinde, that there was a Judgment.

Hallett *verſus* Burch. Paſch. 9 Will. III. B. R.

* 1 Salk. 394. * 2 Salk. 580.

(6.) THIS Caſe is reported in * 1 Salk. by the Name of Holler v. Buſh, and in * 2 Salk. by the Name of Hallet v. Burt; but the Caſe was thus.

Where the Plea amounts to the General Iſſue.

ſſ. Treſpaſs for taking his Cows, &c. The Defendant pleads and ſets forth a Right by Preſcription in the Biſhop of Salisbury, to grant Replevins in ſuch a Manor, and that the Plaintiff cepit & imparcavit three Cows of another, and that he (the Defendant) by Vertue of a Replevin, as Steward, &c. took and drove them away, and traverſed that he was guilty aliter vel alio modo; and upon Demurrer to this Plea it was objected, that it amounts to no more than the General Iſſue; for the Effect of it is, that thoſe were the Cows of another Perſon, and that the Plaintiff took and impounded them: Now by the Impounding the Plaintiff had neither Title or Poſſeſſion, and if ſo, he had no * Colour to bring an Action of Treſpaſs for taking them out of the Pound, for in ſuch Caſe Treſpaſs will not lie, but parco fracto. Et per Curiam, This Plea amounts to no more than the General Iſſue, wherever the Defendant's Plea leaveth a Cauſe of Action in the Plaintiff either expreſs or implied, but confeſſeth and avoideth it, the Plea is good, and this Confeſſion and Avoidance is Colour, without which the Plea would amount but to the General Iſſue: Now in the Principal Caſe the Defendant hath ſet forth in his Plea, that theſe were not the Plaintiff's Cows, but yet, that he took them and imparcavit only, whereby they became in Cuſtodia Legis, and therefore there was no Colour for him to bring an Action of Treſpaſs for taking them out; but if the Defendant had pleaded cepit & detinuit, inſtead of imparcavit, the Plea might have been good.

* 3 Cro. 329.

Hatton *verſus* Morſe. 1 Annæ B. R.

1 Salk. 394. Where a Plea doth not amount to the General Iſſue.

(7.) There is a ſhort Note of this Caſe in 1 Salk. but the Caſe was thus. ſ. In Aſſumpſit, &c. The Defendant pleaded, that true it is, he did promiſe, but that ante diem impetrationis Billæ, he paid the Money; and upon a Demurrer to this Plea it was objected, that it amounted to the General Iſſue. But per Holt Ch. Juſt. This doth not amount to the General Iſſue; for tho' Payment may be given in Evidence upon Non Aſſumpſit pleaded, yet it was long before that obtained; 'tis like giving Colour, for he ſays, there was a Promiſe, but that he performed it: Now there are many Things which may be given in Evidence upon the general Iſſue, and yet thoſe Things may be pleaded Specially; as for Inſtance, In an Action of Debt the Defendant may plead a Releaſe, or he may give it in Evidence upon nil debet pleaded, ſo in Debt for Rent upon a Demiſe, the Defendant may plead an Entry and Eviction, before any Rent became due, or he may give it in Evidence upon nil debet.

Of giving Colour.

(8.) There are two Sorts of Colour, the one is expreſs, the other implied.

(9.) Expreſs, as in Treſpaſs Quare clauſum fregit, the Defendant in Pleading makes a Title under W. R. ſetting forth, that the Plaintiff claims under a Feoffment from the ſaid W. R. by which nothing paſſed, but that he entered by Colour thereof: Now here the Defendant gave Colour of Action to the Plaintiff, becauſe by the Feoffment he was Tenant at Will, and enter'd, and by Vertue of his Poſſeſſion he may maintain an Action againſt every one, but not againſt him who hath a Right; ſo likewiſe in Treſpaſs Quare clauſum fregit, if the Defendant pleads, that the Plaintiff was ſeiſed, &c. and made a Leaſe to him for Years, there is no Occaſion to give expreſs Colour, becauſe the Defendant allows, that the Plaintiff hath the Reverſion, which is Colour enough.

Horne *verſus* Lewin. Hill. 12 Will. III.

2 Salk. 583. Where it amounts to no more than the General Iſſue.

(10.) IN Replevin, the Defendant avowed the Diſtreſs taken for Rent Arrear; the Plaintiff replied, De injuria ſua propria, abſque hoc that any Rent was in Arrear; and upon a Special Demurrer to this Replication, becauſe it amounted to no more than the General Iſſue, it was adjudged, that this was not a proper Inducement to the Traverſe, as if in Treſpaſs the De-

fendant ſhould plead, De injuria ſua propria, abſque hoc quod eſt culpabilis, ſo that in the Principal Caſe, the Plaintiff ſhould have replied, Reins in aretro, and conclude to the Countrey, that had been the proper Iſſue, for it is a Negative to what was before affirmed. So * De injuria ſua propria, abſque hoc that there was ſuch a Preſcription, is ill, and * De injuria ſua propria, abſque hoc that he is a Bailiff, is ill; therefore the natural and proper Replication to this Avowry, had been nihil in aretro; 'tis quaſi the General Iſſue, ſo that this Replication of Special Matter (viz.) De injuria ſua propria, amounts only to the General Iſſue, and no other Evidence can be given, but what might as well have been given upon the proper Iſſue; beſides, this Circumlocution muſt be ill, becauſe it prolongs the Cauſe by enforcing the Avowant to an unneceſſary Rejoinder; and tho' 'tis only Matter of Form, becauſe it doth not alter the Evidence, yet upon a Special Demurrer, and ſhewing it for Cauſe, 'tis naught.

* Raſt. Ent. 557, 558.
* 1 Roll. Rep. 46.

Weſt *verſus* Weſt. Paſch. 12 Will. III.

Where the General Iſſueis pleaded and not entered within four Days, the Defendant may waive it, and plead Specially.

(11.) IN an Action on the Caſe for a Falſe Return, the Practice was agreed to be, that if one pleads the General Iſſue, and 'tis not enter'd, he may within four Days of the Term waive it, and plead Specially, and if Sunday happen to be the laſt of the four Days, then Monday ſhall be allowed; and ſo in Caſe of a Plea in Abatement, and that at any Time afterwards he may waive the Special Matter and plead the General Iſſue, unleſs there is a Rule to plead as he will ſtand by it.

2 Lut. 1178. How a Releaſe is to be pleaded.

(12.) Where the Plaintiff releaſes after the Action brought, the Defendant ought not to plead Actio non, &c. but actionem prædict' ulterius habere non debet, and he ought to plead it either as a Releaſe made pendenti brevi, or puis darrein Continuance; and ſo it is of any Matter which happens either to abate the Writ, or to bar the Action after the Writ brought.

2 Lut. 1181. Of Juſtification under an Act of Parliament.

(13.) Where by an Act of Parliament a Man has leave to juſtifie in general, that he acted by Vertue of ſuch a Statute, according to the Tenor of the Act, he need not alledge particular Circumſtances; but if he doth, and without taking Notice of the Act, 'tis a Waiver thereof, and his Plea muſt be taken as at Common Law.

2 Lut. 1230. Plea that he was ſeiſed, but doth not ſay of what Eſtate, not good.

(14.) In Replevin, for taking in Overfield, &c. the Defendant pleads, that he was ſeiſed of three Acres of Land in Overfield, but doth not ſay in Fee, or of what Eſtate he was ſeiſed; and upon a General Demurrer, the Plea was adjudged ill for

that Cauſe, * but to a Plea in Bar of an Action of Treſpaſs it was otherwiſe adjudged. * 2 Lut. 1313.

(15.) Treſpaſs for Breaking thirty Perch of Hedge and thirty Perch of Ditch; the Defendant preſcribes for a Way, and that ipſe aperuit convenientem & neceſſariam Viam in the Place where, &c. for Carriages, &c. and upon a Demurrer to this Plea it was adjudged ill, becauſe he might have laid out a convenient Way without Breaking thirty Perch of Hedge. 2 Lut. 1350. Juſtification for a Way not well pleaded.

(16.) In Treſpaſs for Breaking his Houſe and Cloſe at D. the Defendant pleads, that the Houſe and Cloſe aforeſaid was a Meſſuage, called Raine's Dwelling-houſe, and twenty Acres of Land, called Raine's Cloſe, which ſaid Meſſuage and twenty Acres of Land, was ſolum ipſius proprium per quod, &c. Et hoc paratus eſt verificare, the Plaintiff replies, that they were liberum tenementum ipſius the Plaintiff, and that the Defendant entered de injuria ſua propria, and traverſed, that they were the Freehold of the Defendant, & hoc paratus eſt verificare; it was held, that this Replication was not in Nature of a new Aſſignment, becauſe that is always of another Place, but here the Place was ſtill the ſame, and therefore the Bar muſt be taken as a real and not a common Bar, and conſequently the Replication ought not to conclude with a Traverſe, but ſhould have put the Matter in Iſſue, (viz.) that it was his Freehold, and not the Defendant's Freehold, and ſo concluded to the Country. 2 Lut. 1402. Where it muſt conclude to the Country.

(17.) In Covenant, the Breach aſſigned was, Non-payment of Rent and not Repairing, the Defendant pleaded an Outlary in Bar to the Action: Et per Curiam, he might have pleaded it in Bar to the Rent arrear, but not to the Repairs, becauſe the Damages for not repairing were not forfeited by the Outlary, and by Conſequence the Plea being in Bar, and not being good as to Part, muſt be ill in the Whole; but if the Defendant had pleaded this Outlary in Abatement, as he might have done before Imparlance, and this to the whole Writ, it had been good, but 'tis not ſo in Bar. 1 Lut. 513. Where an Outlary pleaded in Bar is not good.

Poor Priſoners. *See* Statute 6.

POWERS. *See* Common Recovery 2.

Powers are appendant or collateral.

(1.) Powers are either appendant or collateral, the one is where the Testator devises to W. R for Life, with a Power to make a Jointure, &c. the other is where he devises to his Executor to sell, &c. in the first Case the Power is annexed to the Estate, and derived out of it, in the other Case 'tis collateral to it.

2 Lev. 58. King *v.* Mellin. Power, where destroyed.

(2.) As for Instance, a Devise to W. R. in Tail, Remainder over, with a Power given to him to make a Jointure to a second Wife, &c. The Tenant in Tail, in the Life-time of his first Wife, suffered a Common Recovery to the Use of himself and his Heirs, then his Wife died, and he married a second Wife, and covenanted to stand seised to the Use of himself and his Wife, for their Lives, &c. adjudged, that this Power, when created, was to be executed out of the Estate-tail, which was now destroyed by suffering the Recovery, and by Consequence the Power to make a Jointure was destroyed.

Sid. 107. Of Powers to make Leases.

(3.) Power was given by a Marriage-Settlement to a Jointress to make Leases for twenty-one Years in Possession; the Husband died, and she married again, and then the second Husband and Wife made a Lease, &c. in Possession, but some of the Lands were in Lease before; adjudged, that the Lease was void as to those Lands.

Yel 222.

(4.) If such Power had been to make Leases generally, it shall be intended Leases in Possession.

Ch. Rep. 18. Power not well pursued.

(5.) The Lady Antrim being a single Woman, settled her Estate for Life, Remainder to her in Tail, with a Power to make Leases (being sole) for three Lives, &c. Afterwards she married, and then she and her Husband made a Lease, &c. for Payment of Debts: Et per Curiam, this is void, being not pursuant to the Power, for the Lease of the Husband and Wife is the Lease of the Husband, and the Difference is between a naked Power, and a Power which arises from an Interest; for if a Woman hath only a naked or bare Power, as by a Will to sell Lands, she may sell, tho' she marry, because this is not a Power created out of

any Intereſt; but where a Power is reſerved upon a Settlement, ſhe muſt execute it purſuant to that Power when it was at firſt reſerved.

(6.) In the following Caſe there ſeems to be a contrary Reſolution: ſi. The Father being ſeiſed of Lands in Fee, ſettled the ſame to the Uſe of himſelf for Life, Remainder to his eldeſt Son in Tail, with a Power to make Leaſes, or by his Laſt Will under Hand and Seal, to charge it with 500 l. afterwards, by his Will in Writing, but not ſealed, he charged it with 500 l. for his younger Children, who, upon a Bill exhibited againſt the Heir, had a Decree for the Money, tho' it was objected, that this Settlement was wholly voluntary: But per Curiam, the Power is well executed, for the ſubſtantial Part of it is to do the Thing; and the Neglect of a Circumſtance ſhall not avoid it in a Court of Equity, and the rather, becauſe ſuch Powers are not like Conditions, ſtrictly to be expounded, but favourably to be conſtrued for the Benefit of the Children; and yet a Purchaſor might defend himſelf againſt ſuch a Power not well executed, eſpecially if he had no Notice of it at the Time of the Purchaſe made. Ch. Rep. 263. Smith v. Aſhton.

(7.) Adjudged, that where the Teſtator gives another a Power to ſell Lands, he may ſell his Inheritance, becauſe he gives the ſame Power he had himſelf, and in ſuch Caſe the Purchaſer ſhall be entituled by the Will. 2 Rep. 53. Power to ſell Lands.

(8.) But there is a Difference where Lands are deviſed to Executors to ſell, and where the Deviſe is, that his Lands ſhall be ſold by his Executors; for in the firſt Caſe an Intereſt paſſes to the Executor, becauſe the Lands are expreſly deviſed to him; but in the other Caſe they have only an Authority to ſell, and if one * dies, the other cannot make a Title. Goldſ. 2. Dyer 219. Moor 61. 1 And. 145. * 1 And. 145.

Norris *verſus* Triſt.

(9) IN Eſtament, the Caſe was: ſi. A Feoffment was made to three, Habendum to two for their Lives, Remainder to the third Perſon for his Life, and a Letter of Attorney to give Livery and Seiſin to two, but the Attorney made Livery to all three; it was objected, that the Power was not well executed, and therefore no Livery was made, becauſe the Power was not purſued: Sed per Curiam, 'tis true, that the former Opinions have been, that Powers muſt be exactly purſued, but yet * Endorſing Livery and Seiſin was always favourably expounded to ſupport the Conveyance, therefore this Livery is good for the Lives of 2 Mod. 78. Power good, tho' not ſtrictly purſued. * Sid. 428.

of two, and being made ſecundum formam Chartæ, the Remainder ſhall be good for the third Perſon.

PRESCRIPTION.

Grot. lib. 2. cap. 5. What makes a Preſcription.

(1.) TIME of it ſelf can never be the efficient Cauſe of any Thing, for nothing is or can be done by Time, tho' every Thing is done in Time, therefore by Conſequence it is not the Length of Time that begets the Right of Preſcription, but it is a Preſumption in Law, that a Poſſeſſion cannot continue ſo long quiet and not interrupted, if it was againſt Right, or injurious to another.

1 Vent. 264. Preſcription, that Occupiers have repaired Fences, good, without ſhewing any Eſtate in the Occupiers, but it had not been ſo if the Defendant himſelf had preſcribed.

(2.) The Plaintiff declared, that the Occupiers of the adjoining Field have, Time out of Mind, repaired the Fences, which being out of Repair, his (the Plaintiff's) Beaſts eſcaped out of his own Ground and fell into a Pit; this is good, without ſhewing any Eſtate in the Occupiers, but it had not been ſo if the Defendant himſelf had preſcribed.

2 Lev. 164. But a Cuſtom for Farmers of ſuch a Farm to find Cakes, &c. not good.

(3.) And yet a Cuſtom, that the Farmers of ſuch a Farm have always found Cakes and Ale to the Value of 8 s. or thereabouts, at Perambulations, was held naught, becauſe 'tis no more than a Preſcription in Occupiers, which is not good in Matter to charge the Land.

2 Lut. 1346. Preſcription for Inhabitants, &c. to repair a Way.

3 Cro. 664. March 16. 3 Lev. 160.

(4.) Preſcription by the Inhabitants of a Pariſh to dig Gravel in ſuch a Pit, which is the Soil of W. R. it was doubted, whether this was good, or not, tho' it was to repair the Highway; but yet Inhabitants may preſcribe for a Way, and by Conſequence for neceſſary Materials to repair it, and ſo they may for a Watering-place; and ſo they may to take Ruſhes in the Land of another to ſtrew the Church; and ſo may Maſters of Ships to dig Ballaſt in the Port of Lynn, for this is for the publick Good.

2 Vent. 186. Preſcription in Occupiers, &c. to have a Way from one Houſe to another, not good.

(5.) In Treſpaſs, the Defendant pleads, that within the Pariſh of H. all Occupiers of ſuch a Cloſe habent, & habere conſueverunt, a certain Way leading over the Plaintiff's Cloſe to the Defendant's Houſe, this was held ill, for 'tis not like a Preſcription to a Way to the Church or Market, which are neceſſary, & pro bono publico.

Hill *verſus* Ellard. Mich. 16 Car. II. B. R.

(6.) IN Replevin, for taking a Cow, the Defendant juſtified under a Preſcription to have Common in the Place where, &c. for four Cows and half a Cow; and upon a Demurrer to this Plea it was adjudged to be very abſurd to preſcribe for Common for half a Cow; but having preſcribed to have Common for four Cows, that was ſufficient to juſtify for one Cow.

Preſcription for Common for four Cows, is good for one Cow.

(7.) The Defendant pleads, that he was ſeiſed, &c. and that he, and all thoſe whoſe Eſtate he had, &c. have uſed to have Pot-Water, &c. Adjudged ill, becauſe a Preſcription cannot be annexed to an Eſtate for Years, and he doth not ſay that he was ſeiſed in Fee.

4 Mod. 318. Preſcription cannot be by one who hath an Eſtate for Years. *Poſtea* 9. S.P.

(8.) The Inhabitants of E. joined in a Claim of Common by Preſcription, &c. and it was held, that Tenants in Antient Demeſne may join in ſuch a Claim, becauſe the King cannot claim for them; but in the Principal Caſe, all the Copyholders to one Lord ought to claim in and by that Lord, and that Lord ought to preſcribe for him and his Tenants (i. e.) for his Copyhold Tenants, becauſe he hath the Freehold himſelf; but the Lord cannot claim or preſcribe for the Freeholders, for they have a Freehold in themſelves; beſides Inhabitants can never preſcribe for Common, or other Profit apprender, but only for Matters of Eaſement.

Jones 176. Tenants in Antient Demeſne may join in a Preſcription for Common.

(9.) Preſcriptions are properly Perſonal, and therefore are always alledged in the Perſon of him who preſcribes, (viz.) that he and all thoſe whoſe Eſtate he hath, &c. therefore a Biſhop or Parſon may preſcribe quod ipſe & prædeceſſores ſui, and all they whoſe Eſtate, &c. for there is a perpetual Eſtate, and a perpetual Succeſſion, and the Succeſſor hath the very ſame Eſtate which his Predeceſſor had, for that continues, tho' the Perſon alters, like the Caſe of the Anceſtor and the Heir: but a Tenant for Life or * Years cannot ſay quorum Statum ipſe habet, becauſe he hath a new and diſtinct Eſtate from his Predeceſſor, and ſo 'tis of all Tenants at Will, and Inhabitants, &c. therefore they muſt refer to the Place by Way of Cuſtom.

Preſcriptions are always alledged in the Perſon.

* *Anten* 7.

PRE-

PRESENTATION.

Sid. 93. Of a Preſentation pending a *Quare Impedit.*

(1.) IF the Defendant, or any Stranger, preſents a Clerk pending a Quare Impedit, and afterwards the Plaintiff obtains a Verdict and Judgment, he cannot by Vertue of that Judgment remove him who was thus preſented, but he may bring a Scire facias againſt him, to ſhew Cauſe quare executionem non habet; and then if it be found, that he had no Title he ſhall be amoved. Now the Way to prevent ſuch a Preſentation is to take out a * ne admittas to the Biſhop, and then the Writ Quare incumbravit lies againſt ſuch an Incumbent, who by Vertue thereof ſhall be amoved, and put to his Quare Impedit, let his Title be what it will.

2 Cro. 93. * *Ne admittas.*

1 Mod. 130. 2 Mod. 183. How the Plaintiff muſt declare on a Preſentation.

(2.) Where a Man gets the Fee to his Preſentation, which is his Title, he muſt in his Declaration alledge the Preſentation to be tempore pacis, for otherwiſe it may be intended to be tempore belli, and then 'tis no Title; but where the bare Preſentation is not his Title, but only in Purſuance of a former Right, in ſuch Caſe he may alledge it generally.

(3.) As for Inſtance, where a Man declares, that W. R. was ſeiſed of the Manor of D. as of Fee, to which an Advowſon was appendant, and that being ſo ſeiſed he preſented W. W. and afterwards granted the next Avoidance to the Plaintiff; this is good, for here the Plaintiff ſhews a precedent Right, and doth not make the Preſentation itſelf his Title.

Holt *verſus Biſhop of* Winton.

3 Lev. 47. Where the Incumbent is likewiſe Patron and dies, his Heir, and not his Executor, ſhall preſent.

(4.) IN a Quare Impedit, the Caſe was, ſi. The Incumbent being ſeiſed of the Advowſon of the ſame Church in Fee, died, and the Queſtion was, who ſhould preſent, either his Heir at Law or his Executor; and upon a Demurrer, it was objected againſt the Right of the Heir at Law, that he could not preſent, becauſe the Advowſon did not deſcend to him till after the Death of his Anceſtor, in which very Inſtant of Time the Church was void; and therefore the Avoidance was ſevered from the Inheritance, and veſted in the Executor. Sed per Curiam, the Heir ſhall preſent, becauſe at the ſame Time that the Avoidance veſted in the Executor the Inheritance deſcended to the Heir,

and where two Titles concur in an Inſtant of Time, the Elder ſhall be preferred.

PRIVILEGE.

(1.) IN the Court of Exchequer there are three Sorts of Perſons who are privileged, (i. e.) Debtors to the King, Officers and Accountants; againſt the firſt of theſe Perſons any Man who has a Privilege in another Court, as an Officer or Attorney thereof, ſhall have his Privilege, for the Privilege of a Perſon as Debtor is but a general Privilege; it was at firſt only for the Benefit of the King, which is now diſuſed, and a Quo minus is no more than a Common Action in this Court. Hard. 365, 507. Of Privilege of the Court of Exchequer.

(2.) An Accomptant entered upon his Accompt, and adjudged, that he ſhall have his Privilege till the Accompt is over, becauſe his Attendance here de die in diem is neceſſary to paſs his Accompt, and the King has an Intereſt in his Attendance; but when the Accompt is finiſhed, and become a Debt by being reduced to a Certainty, he then hath no other Privilege than a General Debtor. Ibidem.

(3.) If an Officer commence a Suit here, no Privilege in any other Court ſhall prevail againſt it, becauſe his Attendance is requiſite here, and his Privilege is firſt attached in this Court.

(4.) Sir Edm. Sawyer being preſented in Eyre, delivered in a Superſedeas for his Privilege, as one of the Auditors of the Exchequer; to which it was objected, that he ought to plead his Privilege, if he had any; for the Privileges of the Exchequer are all in the Red Book, and the Order is, that if an Officer of the Exchequer is impleaded elſewhere, that a Baron coming with that Book, and ſhewing the Order, and alſo avowing the Perſon to be an Officer of that Court, the Privilege ſhall be allowed without any Plea; but where the Book is not produced the Privilege muſt be pleaded; but if the Defendant in this Caſe had pleaded his Privilege, it was a Queſtion, whether it would have been allowed, becauſe he was an Auditor of the New Revenues, and none of the Antient Auditors. Jones. 288.

1 Mod. 298. Privilege of Attorney of Common Pleas.

(5.) An Attorney or Philazer of the Common Pleas, if ſued in B. R. may plead his Privilege, becauſe they owe a perſonal Attendance to that Court; but a Serjeant at Law being ſued in B. R. he cannot plead his Privilege of C. B. for he may ſign Pleas, be aſſigned of Counſel, and Practice in other Courts in Weſtminſter-Hall, but if he is ſued in any Inferior Court, he ſhall have his Privilege.

Ibidem.

(6.) Where an Officer of the Court of C. B. is ſued jointly with a Stranger, who hath no Privilege, in ſuch Caſe, the Officer ſo ſued ſhall not have his Privilege.

Kirkham *verſus* Wheely. Trin. 7 Will. III. B. R.

2 Salk. 543. Where a Plea in the Negative, and without full Defence, is good.

(7.) IN an Action Qui tam, &c. the Defendant in propria perſona ſua dicit, that he is an Attorney of the Common Pleas, and that the Attornies of that Court have Time out of Mind not been ſueable elſewhere; and upon a Demurrer to this Plea, it was objected, that it was pleaded in the Negative, (viz. That Attornies of the Court of Common Pleas, &c. have not been ſueable elſewhere, and no Juriſdiction is given or ſhewed to any other Court: Another Objection was, that the Defendant hath not made a full Defence, for he only ſaid in propria ſua dicit, when it ſhould be venit & dicit; and the laſt Objection was, becauſe the King is made a Party in this Action, and he hath Privilege to ſue where he pleaſes. Sed per Curiam, this Plea in the Negative is well enough, becauſe the Privilege, if traverſed, is not triable by the Countrey, for 'tis Matter of Law, and there is a Juriſdiction given to the Court; as to the ſecond Objection, venit is no Part of the Plea, and therefore it may be omitted; but the Plea begins by the Word dicit, and thereof that alone is ſufficient: And as to the third Objection, 'tis true, the King is entituled to bring his Action where he pleaſes, but the Informer is not; for if he die there is an End of the Suit, and the King is not entituled till Recovery had; and Proſecutors Qui tam, &c. are look'd upon as Informers.

Baker *verſus* Swindon. Mich. 10 Will. III. C. B.

(8.) IN this Caſe it was held per Holt Ch. Juſt. that Privilege is either of Court or of Proceſs, as in the Court of Common Pleas, every Perſon who belongs to that Court, as Attornies, their Clerks, &c. ſhall have the Privilege of being ſued there, and not elſewhere; and this is the Privilege of Court: But none ſhall be allowed the Privilege of Proceſs, but thoſe who are Officers of the Court, and are ſuppoſed to be always attending there.

Two Sorts of Privilege, (*viz.*) of Court and of Proceſs. *Poſtea* 10. S. P.

Edwards *verſus* Copland. Paſch. 6 Will. III. B. R.

(9.) IN an Action on the Caſe, the Defendant pleaded to the Juriſdiction of the Court, that he is an Attorney of the Court of Common Pleas, and ought to be ſued there, &c. the Plaintiff replied, that he (the Defendant) is not an Attorney of the Court of Common Pleas, and concludes to the Country, and upon Demurrer to this Replication, the Rule was for the Defendant to anſwer over, for 'tis a good Traverſe and Concluſion; and in this Caſe it was held, that the Defendant might plead this Privilege per Attornatum.

Where Privilege may be pleaded *per Attornatum*.

Willis *verſus* Batterſhell. Trin. 6 Will. III. B. R.

(10.) IN Aſſault and Battery the Defendant pleaded to the Juriſdiction of the Court, that he is one of the Clerks of *J. Cook*, Prothonotary of the Court of Common Pleas, quodq; ipſe & omnes hujuſmodi Clerici de eadem Curia, ought not to be impleaded but in that Court; and upon a Demurrer to this Plea the Plaintiff had Judgment, becauſe the Defendant did not alledge himſelf to be a Clerk of the Common Pleas to whom this Privilege (as he pretended) did belong, but only that he was Clerk to a Prothonotary of that Court, and B. R. will not intend the Privilege to be other than as he hath pleaded it.

Privilege not well pleaded.

Ogle *verſus* Norcliffe. Paſch. 2 Annæ.

(11.) THere are two Sorts of Privilege in the Court of Common Pleas: Per Holt Ch. Juſt. the one is of the Officers of that Court, to be ſued there by Bill, and the other is of their Clerks, to be ſued there, and not elſewhere by Original.

Two Sorts of Privilege. *Antea* 7. S. P.

L. C. 6. Mod. 77. 73.

Elderton's *Case*. Mich. 2 Annæ, B. R.

Mod. Cases 73. Privilege of a King's Palace. *Antea* Commitment 1. S. C.

(12.) HE was committed by the Board of Green-cloth, for executing a Fieri facias in White-hall; and upon an Habeas Corpus it was argued to be a lawful Execution of the Writ, and not prejudicial to the Privilege of the Palace, and that admitting it was a Breach of the Peace, yet the Board of Green-cloth had no Power to commit this Person, because he was not the Queen's Servant, and that Court hath only a Power over the Queen's Family, for the Government and ordering her menial Servants, and that the Privilege of White-hall was created by the Statute 28 H. 8. cap. 12.

Northy Attorney-General, argued to the contrary: 1st. That there was a standing Commission of the Peace for the Verge and Palace, and that the Officers of the Green-cloth are always Commissioners, that the Statute 28 H. 8. did not create the Privileges of this Palace, but ascertained the Boundaries thereof, for the Queen may declare any House to be a Royal Palace, and this without any Act of Parliament; that such Declaration is made under the Great Seal, after which 'tis a Palace, tho' the Queen doth not reside there; for the Queen did not reside at the Tower, and yet Burdett had his Hand cut off for murdering his Keeper there, and was afterwards executed.

Per Powell Just. the Privileges of the Palace are by Common Law, and that in respect of the Queen's Presence; and he said, that the Breaking into the Exchequer had been held Burglary, tho' none of the Queen's Servants were there.

But Holt Ch. Just. denied it, and as to Burdett's Case, he said the same Fact cannot be a Misprision and a Murder too, for the one will extinguish the other; 'tis true, his Hand was cut off, but it was without any Authority, for there was no Judgment for it; he said, that he had searched the Roll, which was Mich. 15 & 16 Eliz. Rot. 2. Burdett and Muskett's Case, and there was no Judgment for cutting off his Hand. *See* Stow Chr.

He held, that where there was a total Absence, as in the principal Case, where the Queen was neither present in Person nor by her Domesticks, or any of her Family, the Place was not privileged; otherwise where there was only a short and personal Absence: The Queen now resides at Windsor, and suppose a Murder should be committed in White-hall, shall that be tried before the Lord high Steward, &c. certainly not.

Brown

Brown *versus* Burlace. 9 Will. III. B. R.

(13.) THE Defendant was arrested in the Temple, and upon a Motion to set it aside, it was insisted for him, that the Temple is * privileged from Arrests by the King's Grant.

But per Holt Ch. Just. if the King hath made any such Grant, 'tis void in Law, they having no Court of Justice within themselves there; 'tis true, the Temple is extraparochial, and not within any Parish, nor within the City, so as to come within the Customs of the City, but 'tis within the County of the City, but the White-fryars is within the Jurisdiction of the City.

Yet the Court inclined not to countenance Arrests in the Temple, especially in Term-time, but would not set aside this Arrest, so the Defendant was held to Special Bail.

Antea Arrest 1. S.C. * Dugdale 317, 320. Stow Chron.

Ruth *versus* Weddall.

(14.) DEBT upon Bond in B. R. brought against an Attorney of the C. B. the Defendant pleaded, that he is an Attorney of C. B. and that there is a Custom in that Court, that an Attorney shall not be compelled to answer, unless per Billam, and so pleads his Privilege to be sued per Billam, and not by Original; the Plaintiff replied, that for five Years past, before the Original filed, the Defendant had no Clients, but had withdrawn himself from the Practice and Office of an Attorney; and upon a Demurrer to this Replication, first it was objected, that the Plea was ill, because the Defendant had not set forth, that he had any Clients, or that he prosecuted or defended any Suits, that being the Reason why an Attorney should have Privilege: Sed per Curiam, as long as an Attorney is so upon Record, he shall have Privilege; then it was objected, that this Custom was alledged in Fieri, for it was, that an Attorney should not be compelled to answer, unless per Billam, he should have gone on, Nec a tempore cujus contrarium memoria hominum non existit compelli consuevit, and this would have been an Allegation of an Usage in Fact, which is essential to make a Custom, and therefore must be positively set forth and alledged in Pleading; but adjudged, that the Court may take Notice of the Privileges of Attornies, therefore a Custom in such Cases need not be so strictly alledged.

2 Lutw. Privilege of Attorney well pleaded.

PRO-

PROCESS.

(1.) AT Common Law, where the King was Plaintiff in any Action, whether for Debt or Damages, he had Execution against the Defendant, both for Body, Lands and Goods, but by Magna Charta, cap. 9. he was not to take out Execution against the Lands, if the Defendant had sufficient Goods to answer the Debt or Damages.

(2.) But where a Subject brought an Action against another Subject, either for a Debt or Damages, his Execution was only against the Goods and Chattels of the Defendant, either by Fieri facias or by Levari facias, he could not have Execution against his Lands, till the Statute of Westm. 2. by which cum Debitum recuperatum est an Elegit is given, and that was only for a Moiety; and by the Statutes 13 Ed. 1. de mercatoribus, by the 27 Ed. 3. and by the 23 H. 8. an Extent was given, but no Capias lay till the Statute of Marlbridge, cap. 23. and Westm. 2. cap. 11. and 25 Ed. 3. cap. 17. by which Process of Capias is given in Accompt and also in Debt, whereas before those Statutes the Process was Summons, Attachment, and Distress infinite.

(3.) The Process of Capias on a Judgment in Debt is not given by the express Words of any Statute, but arises by Consequence of Law (i. e.) the Statute giving a Capias in mesne Process, a Capias in Consequence lies on the Judgment, because 'tis a Rule of the Common Law, that wherever a Capias lies in Process before Judgment, it will lie in Execution upon the Judgment it self.

(4.) But if there is a Judgment in C. B. against the Bail, upon a Scire facias brought against them, no Capias lies on such Judgment; otherwise if the Judgment was given against them in Debt, for then 'tis within the Statute.

(5.) But where Judgment is given as a Scire facias upon a Recognisance against the Bail in B. R. a Capias will lie, for so has been the Course of that Court.

1 Roll. 898. (6.) There was a Judgment on a Scire facias against the Bail, and a Writ of Error brought in the Exchequer-Chamber, pursuant to the Statute 3 Jac. adjudged, that in this Case no Capias

pias lies against them, for this Matter is not to be guided by the Custom of the King's Bench, but by the Common Law, and the Bail bound their Goods and Lands by the Recognisance, and not their Persons.

PROHIBITION.

(1.) PRohibitions are granted either pro defectu jurisdictionis, or pro defectu triationis; as where a Man libells in the Spiritual Court for 20 s. due to him by Custom, for burying in the Church, the Defendant pleaded there was no such Custom; in this Case a Prohibition lies pro defectu triationis, for the Spiritual Courts cannot try a Custom. 1 Vent. 274.

(2.) A Prohibition was granted to Wood-street Compter for refusing to admit a Plea to the Jurisdiction, which was tender'd on Oath, and before Imparlance. 1 Vent. 180.

(3.) In a Prohibition, and upon a Motion for a Consultation, it was insisted, that it ought not to be granted without pleading or demurring to the Prohibition, for if erroniously granted, the Party could have no Remedy, either by Writ of Error or otherwise; but it was answered, that antiently in B. R. there were no Declarations or Demurrers upon Prohibitions, and therefore Consultations were granted upon Motions.

(4.) In a Prohibition to the Spiritual Court, upon a Suggestion, that they intended to try the Boundaries of a Parish; the Plaintiff declared and entituled himself by Letters Patents granted to such a Corporation, who made a Lease to him, &c. the Defendant demurred to the Declaration, for not shewing the Letters Patents and the Lease, by a profert hic in Cur'. Sed per Curiam, no Consultation shall be granted for Want of pleading them, for they may be given in Evidence. 1 Roll. Rep. 332. Letters Patents may be given in Evidence.

(5.) Where it appears upon the Face of the Libel, that the Matter is not within the Jurisdiction of the Court, nor proper for their Sentence, a Prohibition will be granted at any Time; but if the Plea of the Defendant be Matter of Spiritual Jurisdiction, and 'tis refused or over-ruled, no Prohibition lies, for 1 Mod. 273. Where a Prohibition may be granted at any Time.

for in such Case the Party must appeal; otherwise, if 'tis a Matter of Temporal Cognisance, as a Modus, or an Agreement, &c.

Freeman *versus* Shotter.

How the Spiritual Court is to try a a Thing of Temporal Nature.

(6.) RUled, that where a Thing incident in the Spiritual Court is of a Temporal Nature, they must try it in the same Manner in that Court, as it would have been tried at Law, otherwise a Procedendo will be granted; but if the Matter incident is of a Spiritual Nature, or of Spiritual Cognisance, they may try it according to their own Law; as for Instance, if they require two Witnesses to the Proof of a Revocation of a Will, a Prohibition will not be granted, because such Proof is required at Law; but if they require two Witnesses to prove a Release, a Prohibition will be granted.

Anonymus. Hill. 9 Will. III.

Where an Inferior Court hath no Original Jurisdiction, Prohibition will not lie after Sentence.
* Sid 166. *contra.*

(7.) PER Holt Ch. Just. Where an Action is commenced in an Inferior Court of Law, which hath no Jurisdiction of the Cause, in such Case a Prohibition will not lie after * Sentence; but 'tis otherwise, if the Suit is commenced in the Admiralty, or in the Spiritual Court, for their Law is different from ours.

Anonymus. Hill. 13 Will. III.

Prohibition to the Spiritual Court for Words.

(8.) LIbel in the Spiritual Court by the Husband and Wife, for calling the Husband Cuckold: Ruled per Holt, Ch. Just. that a Prohibition shall go, because they cannot both sue in that Court for that Word.

Brown *versus* Tanner. Pasch. 2 Annæ.

Prohibition for calling the Parson Drunkard.
* Cro. Car. 207.
March. 6.
S. P.
*2 Roll. 296.

(9.) LIbel in the Spiritual Court, for Brawling in the Churchyard, and for telling the Parson, Thou art a pitiful drunken Parson, and a drunken Puppy; and Salkeld moved for a Prohibition upon the Authority of the Case between * Star and Bucknell, where for the like Words a Prohibition was granted, and so in *Haines's Case; and the Reason was, because Drunkenness is a Temporal Offence; 'tis true, the Cases before mentioned were of Drunkenness in Lay-Men, but if 'tis an Offence in a Lay-man, a fortiori it should be so in a Clergy-man; 'tis a Crime which doth not take its Nature from the Person who commits it, but

from the Law which is offended; *'tis true, the Canoniſts make every Thing which is a Sin, and forbidden by the Ten Commandments, to be a Spiritual Offence, as Læſa fides, Murder, Perjury, &c. But by the Common Law, whatever is taken Notice of and puniſhable by the Temporal Laws, is a Temporal Offence; and what is not puniſhable by the Temporal Law, but by the Spiritual Law, in ſuch Caſe, that Law is a kind of Supplanting the Temporal Law, and the Offences ſo puniſhable are Spiritual Offences, as Fornication, Adultery, &c.

* *Couſins's* Apology.

Now as for Drunkenneſs, it was always accounted a Temporal Offence, for it was indictable at Common Law; and Alehouſes were formerly appointed in the Leet, and before the * 24 of Eliz. there was ſcarce ſuch a Crime in England: 'Tis true, a Parſon may be deprived for Drunkenneſs, and ſo he may for * Buggery, but yet he is not puniſhable for that Offence in the Spiritual Court, becauſe 'tis a Temporal Offence; afterwards a Prohibition was granted as to the Words, but not as to the Brawling in the Churchyard.

* Cambden Eliz. 263.

* Hob. 121, 290. 2 Roll. *Higgins's Caſe.* 296. and 12 Rep. 42. *Fuller's Caſe.*

Anonymus.

(10.) PER Ch. Juſt. In the Caſes of Prohibitions, where they were granted upon a Motion, the antient Courſe was, that the Party prohibited ſued out a Scire facias, Quare Conſultatio non debet concedi poſt prohibitionem, in which Writ the Suggeſtion was recited, and alſo a Prohibition granted thereon, ad damnum of the Party.

The antient Courſe of Proceedings on a Prohibition.

Plow. Com. 472. Reg. 71.

Afterwards this Practiſe was altered, and the Courſe came to be thus, (viz.) Upon granting a Prohibition to the Plaintiff, the Court bound him in a Recogniſance to proſecute an Attachment of Contempt againſt the Defendant, for ſuing in the Spiritual Court after a Prohibition granted, and then to declare upon the Prohibition; ſo that he was the Defendant in that Court, is now become Actor or Plaintiff in the Court above.

The Queen verſus Ride. Mich. 3 Annæ B. R.

(11.) A Popiſh Recuſant convict made his Wife Executrix, the Spiritual Court admitted her to proceed in proving the Will, but a Prohibition was granted, for ſhe is diſabled by the General Clauſe of the * Statute of Eliz. and not enabled by the Proviſo.

* Cap. 4. Par. 22.

PROPERTY. *See* Treſpaſs. Replevin, 4.

Sutton *verſus* Moody.

5 Mod. 375. 2 Salk. 556.

1 Cro. 553, 545. Jones 440. March. 44. Of the different Sorts of Property.

(1) IN this Caſe it was held per Holt Ch. Juſt. That if the Plaintiff declared in Treſpaſs for Breaking his Cloſe and killing centum cuniculos, 'tis good without ſaying ſuos, for he has a Property in them in Reſpect of his Cloſe where they were killed; and of Things of this Nature there are three Kinds of Property, (viz.) abſolute, qualified and poſſeſſory. 1. A Man hath an abſolute Property in Feris natura ſua manſuetis. (2.) He hath a qualified Property in Feris manſuetis; and (3.) he hath a poſſeſſory Property in Feris: Now whoever hath a poſſeſſory Property, which is alſo a Property ratione privilegii, there he may declare for the Thing killed or taken, without ſaying that it was * ſuum, for he had a Property by Reaſon of his Cloſe in which it was, and may recover Damages, which he cannot do unleſs the Thing was ſuum. He farther held, that if a Man finds a Hare in his own Land, and in Hunting kills it on the Land of another, 'tis the Property of the Hunter, and not of the Perſon on whoſe Ground it was killed; ſo if he ſtarts a Hare not on his own but another Man's Land, and hunts it into the Land of a third Perſon, and there kills it, the Property is ſtill in the Hunter; but if he ſtarts a Hare in a Foreſt, and hunts and kills it in another Man's Land, the Property is in the Owner of the Foreſt.

* 7 Rep. 17. b.

Evans *verſus* Martell. Mich. 9 Will. III. B. R.

Where the Conſignment of Goods to another veſts a Property.

(2.) ONE Harvey loaded Goods on Board a Ship, and conſigned them to Evans; but by the Invoice the Goods appeared to be the Property of Harvey, and now in an Action brought by Evans againſt the Defendant Martell for theſe Goods, it was adjudged, that the Invoice ſignifies little in this Caſe, but that it was the Conſignment of the Goods, which gave the Property, and veſted it in Evans, and therefore he might maintain this Action;

but if they had been conſigned to him upon the Accompt of Harvey, that would have altered the Caſe, for then he would have been only Factor to Harvey, and he muſt have brought the Action, becauſe the Property was then in him.

Gipps *verſus* Woolliſcott. Trin. 7 Will. III. B. R. Rot. 301.

(3.) TReſpaſs, &c. for that the Defendant in ſeparali Piſcaria, & in libera Piſcaria ſua apud D. piſcavit, and did take and carry away * 500 Salmons; upon Not guilty pleaded, the Defendant was found guilty as to the Fiſhing in the free Fiſhery of the Plaintiff; and as to the ſeveral Fiſhery, the Jury found that the Locus in quo, &c. was Parcel of his Manor.

Et per Holt Ch. Juſt. a Man may have a free Fiſhery in his own Soil, as for Inſtance, he may have a River in his Manor, and another may have a Right of Fiſhing there with him: But becauſe the Plaintiff in his Declaration had not alledged, that the Defendant took Salmones ſuos, nor ibidem cepit, therefore the Defendant had Judgment.

Treſpaſs for taking Fiſh, and did not ſay *ſuos*, not good. * Indictment 14. 3 Mod. 97. *Poſtea* 4.

The Queen verſus Steer.

(4.) THE Defendant was indicted, for that at ſuch a Time and Place, he illicite fiſhed with Nets in the Pond of T. S. and ſo many Carps, de Bonis & Catallis of the ſaid T. S. did take and carry away; it was objected againſt this Indictment that Fiſh in a Pond could not be called Bona & Catalla of any particular Perſon: Sed per Curiam, in a * cloſe Pond the Fiſh may be called * Piſces ſuos, becauſe they cannot ſwim away, and therefore the Owner of ſuch Pond hath a Property in them ratione loci; but yet they cannot properly be called Bona & Catalla, unleſs they are in Trunks, and for that Reaſon this Indictment was held ill, but the Court would not quaſh it upon a Motion, but ordered the Defendant either to plead to it or to demur.

Mod. Caſes 183. Fiſh in a Pond may be called *ſuos*.

* 3 Mod. 97. *contra*. *Vide* Jones 440. March 48. That they may be called *Piſces ſuos*.

Mallock *verſus* Eaſtley.

(5.) TReſpaſs for taking two Does ipſius querentis, in a Cloſe called the Park; the Defendant demurred generally, for that the Plaintiff ſet forth in his Declaration, that they were his Does, when by Law no Man can have a Property in Deer, unleſs they are tame or reclaimed, tho' they are in a Park; but in the principal Caſe it did not appear, that they were

3 Lev. 227. Treſpaſs for taking two Does *ipſius querentis*.

in a Park, but in a Close called the Park; and for this Reason the Defendant had Judgment.

PURCHASE.

Where the Word *Heirs* is a Name of Purchase, and where a Word of Limitation.

(1.) THE Word Heirs or Issue, when used to denote a single Person, or so as to be only designatio personæ, are Words of Purchase only, but when collective, they are Words of Limitation.

Where the Word *Heirs* is *designatio personæ.*

(2.) When ever those Words Heirs or Issue have Words of Limitation annexed to them, they are used only as designatio personæ, as where a Devise is to W. R. for Life, Remainder to his Heirs, and to the Heirs Females of their Bodies.

Where a Remainder to a Man and his Heirs is conveyed by Way of Use.

(3.) If a Man make a Lease for Life, Remainder to his Heirs, or Remainder to himself and his Heirs, or to himself and the Heirs of his Body, the Remainder is void, and his Estate is not altered; but 'tis otherwise if he convey it by Way of Use with such Limitations.

1 Mod. 159.
1 Vent. 378.
Remainder to Heirs Males of his Body is an Estate-tail executed.

(4.) As if he make a Feoffment to the Use of himself for Life, Remainder to the Heirs Males of his Body, this is an Entail executed in him, and so it is, if he covenanted to stand seised in the same Manner.

Where the Heir is in by Purchase.

(5.) Where the Father devises to his eldest Son upon Condition, in such Case the Son shall be in by Purchase, and not by Descent.

1 Mod. 226.
Where an Estate is vested by Way of Purchase, it shall afterwards go in a Course of Descent.

(6.) The Case was, the Father having two Sons, in Consideration of the Marriage of his eldest Son, covenanted to stand seised to the Use of his said eldest Son, and the Heirs Males of his Body, Remainder to the right Heirs of the Father; the eldest Son married, and had issue Edward and four Daughters, then the eldest Son died, and afterwards Edward the Grandson died without Issue; and the Question was, who had the best Title, either the second Son or the Daughters of his elder Brother; and adjudged, that the Limitation to the eldest Son, and to the Heirs Males of his Body, is good; and that the Estate vested

in him by Way of Purchaſe, tho' at Common Law a Man could not make his own right Heir take by Purchaſe, without departing with the whole Fee-ſimple, but now by Way of Uſe he may; and in this Caſe, after the Death of the Grandfather, both the Eſtates-tail were veſted in Edward the Grandſon, (viz.) As Heir Male of the Body of his Grandfather and Father; and if ſo, then this being a Remainder veſted in him as a Purchaſer, the Eſtate ſhall go on in a Courſe of Deſcent, and his Siſters ſhall have it.

QUARE IMPEDIT.

(1.) THIS is a poſſeſſory Action, and therefore not to be maintained without a Poſſeſſion, for which Reaſon the Plaintiff muſt always declare upon a Preſentation made by himſelf or his Anceſtor, or one whoſe Eſtate he hath, or by the Grantee of the next Avoidance, or by his Leſſee for Life, or for Years.

This is a poſſeſſory Action, and how to declare in it.

(2.) In a Quare Impedit againſt the Biſhop, and againſt A. and B. the Patron and Clerk, in which the Plaintiff declared, that W. R. was ſeiſed of a Manor to which the Advowſon was appendant, and preſented S. and that by Eſcheat the ſaid Manor and Advowſon came to the King, and that he granted them to the Plaintiff; and that S. the Incumbent being dead, it belonged to him (the Plaintiff) to preſent; the Biſhop confeſſes all the Declaration, only ſays, that the King was ſeiſed and preſented B. and traverſed, that he granted the Manor and Advowſon to the Plaintiff, B. the Incumbent pleads, that he is perſona imperſonata ex preſentatione Domini Regis, and makes Title in the King; the Plaintiff replies, that B. was not preſented by the King, &c. upon which B. demurs; and per Curiam, the Biſhop's Plea is not good, for he can never counterplead the Title of the Plaintiff without making a Title in himſelf, either as Patron or by Lapſe, for otherwiſe he hath no Intereſt, but only Inſtitution; and the Plea of the Incumbent is likewiſe ill, for by the Common Law he could not maintain the Title of his Patron; and if the Patron was not made Defendant with him, then he (the Incumbent) might plead it in Abatement; if he was made Defendant, then he was to plead his own Title, which was ſometimes found to be in-

Jones 5. Where the Ordinary cannot counterplead the Plaintiff's Title, without making a Title in himſelf.

inconvenient, because he would plead by Covin; therefore by the Statute 25 Ed. 3. the Incumbent is allowed to plead the Title of his Patron; but in the principal Case, if he was presented by A. he cannot quit the Title of that Patron, and plead a Presentation and Title by another Person.

1 Roll. Rep. 62. (3.) The very Judgment in a Quare Impedit is an Amotion of the Incumbent, tho' he continue still the Possession de facto, and if the Plaintiff be instituted upon a Writ to the Bishop, the Defendant cannot appeal, if he doth, a Prohibition lies, because in this Case the Bishop acts as the King's Minister and not as a Judge.

QUOD CUM. *See* Forgery 1. Indictment 6.

RECORD. *See* Statute 5.

Crockmere *versus* Wickins. Hill. 8 Will. III. B. R.

Where *Nul tiel Record* is pleaded, the Party cannot demur to it.

(1.) AN Action was brought in B. R. the Defendant pleaded another Action depending between them in the same Court, and for the same Cause; the Plaintiff replied, Nul tiel Record, &c. adjudged, that in this Case the Defendant may pray Oyer of the Record, and the Court may order that it may be inspected, and upon such Oyer craved, an Entry shall be made for the Court to examine the Record, and Judgment shall be given upon Failure of the Record; the Defendant may likewise plead Nul tiel Record,

cord, and then alſo the Entry and Proceedings ſhall be as before mentioned; but he cannot rejoin properly quod habetur aliquod tale Recordum; neither can he demur, for the Record is perfect, and the Pleading is at an End, and therefore a Demurrer in this Caſe was upon a Motion ruled to be irregular, and ſet aſide.

(2.) But if the Action had been pleaded as depending in another Court, pro eadem cauſa, and the Plaintiff replied Nul tiel Record, the Defendant muſt have rejoined quod habetur aliquod tale Recordum.

Where *habetur aliquod tale Recordum* is a good Plea. *Poſtea* 3. S. P. * Dyer 180. a.

Hambleton *verſus* Lancaſhire. Trin. 2 Annæ B. R.

Of pleading *Nul tiel Record.*

(3.) A Scire facias was brought againſt the Bail in B. R. upon a Recogniſance in that Court; the Defendant pleaded in Abatement another Scire facias depending in the ſame Court, and upon the ſame Judgment: The Plaintiff replied, Nul tiel Record, & hoc paratus eſt verificare, prout curia conſideravit, upon which there was this Entry, Et quia Curia Dominæ Reginæ nunc hic coram ipſa Domina Regina adviſare vult ſuperinſpectionem & examinationem Recordi per prædict' the Parties allegat' priuſquam judicium ſuum inde reddant, dies inde datus eſt partibus prædict' coram ipſa Domina Regina, &c. Uſque ad, &c. de judicio inde de & ſuper præmiſſis reddendo, &c. upon which there being a Default at the Day, Judgment was given againſt the Defendant: And now Mr. Broderick moved, that this was irregular, and that the Plaintiff ought to have ſtaid for a Rejoinder, and he argued, that this was contrary to all the * Precedents, and he cited all thoſe in the Margin. But on the other Side Mountague argued, that the Judgment was well given; and to prove it he cited Dyer 228. and * Buck's Caſe in B. R. which he ſaid was a Caſe in Point.

* Coke Ent. 160. Raſt. 334, 335. Robinſon, 214. Hern. 238. Vidian 48. Thompſ. 280. * Mich. 8 Will. 3 Rot. 455.

Per Holt Ch. Juſt. Where the Record pleaded is in the ſame Court in which the Action is brought, there Nul tiel Record is not ſo proper as to crave Oyer of the Record, and that not at a Day to come, but inſtanter; but if the Plaintiff replies Nul tiel Record, 'tis a Traverſe of the Defendant's Plea, and ſuch an Entry (as in this Caſe) is the proper Courſe, and more to the Defendant's Advantage than Craving Oyer, becauſe he has a Day given him to bring in the Record, and there can be no Trial in this Caſe, as where the Record is in another Court, and for that Reaſon 'tis improper to rejoin * quod habetur aliquod tale Recordum, as it ought where the Record is in another Court; for in ſuch Caſe B. R. awards a Certiorari to that Court, and the Iſſue is tried by their Certificate, but we cannot award a Certiorari

* *Antea* 3.

rari to our ſelves; for it would be abſurd to certify our ſelves. Powell, Juſt. at firſt was of a contrary Opinion, that this Judgment was not well given, becauſe the Plaintiff had averred his Replication, which Averment ought to have been anſwered by the Defendant, for otherwiſe the Record is not cloſed and perfected; but it being moved again upon another Day, he came over to the Opinion of the Chief Juſtice.

Sid. 356. Where a Record is miſrecited, the other Side muſt not demur.

(6.) Adjudged, that where a Pleader miſrecites a private Act of Parliament, the adverſe Party cannot demur, but muſt plead Nul tiel Record, for upon a Demurrer it muſt be taken to be as pleaded.

1 Vent. 212. Inferior Courts certify *tenorem Recordi.*

7. In an Action of Debt brought upon a Judgment in an Inferior Court, if the Defendant pleads Nul tiel Record, they ſhall certify only tenorem Recordi; and the Lord Chief Juſtice Hale ſaid, that he had ſeen Certiorari's which only certify tenorem Recordi.

RECOVERY COMMON.

King *verſus* Melling.

2 Lev. 58. Raym. 425. 1 Vent. 214, 225. Where a Deviſe to B. and the Iſſue of his Body, makes an Eſtate-tail, and where ſuch an Eſtate is bared by Common Recovery.

(1.) THIS Caſe is reported in ſeveral Books, (viz.) The Father deviſed his Lands to his Son B. for Life, and after his Decreaſe, to the Iſſue of his Body, &c. and for Want of ſuch Iſſue Remainder over. B. ſuffered a Common Recovery, and the Queſtion was, what Eſtate B. had. Two Judges held, that he had only an Eſtate for Life, becauſe ſuch an Eſtate was expreſly deviſed to him. But Hale Ch. Juſt. held, that he had an Eſtate tail by Implication, and by Conſequence the Recovery well ſuffer'd, for the Words Iſſue of his Body is nomen collectivum, and the Words which follow, (viz.) for Want of ſuch Iſſue, make an Eſtate-tail by Implication; but Judgment being given according to the Opinion of thoſe two Judges, it was afterwards reverſed in the Exchequer-Chamber, according to the Opinion of

the Chief Justice; and there it was held, that where an Estate-tail is barred by a Recovery, all Things depending upon it, as Remainders, and all Things derived out of it, such as Rents, &c. are barred as well as the Estate itself, but nothing which is collateral.

Therefore a Recovery will not bar the Right of a Mortgagee, unless he is vouched, so likewise of an executory Devise; but it will bar a contingent Remainder.

(2.) So where Tenant for Life, with a Power to make a Jointure on his Wife, suffers a Common Recovery, his Power is extinguished; but 'tis otherwise where a Power is collateral; as for Instance, where an Executor has Power to sell.

(3.) One seised in Fee of Lands, granted a Rent de novo to A. in Tail, Remainder to B. in Fee; A. suffered a Common Recovery, Adjudged, that the Estate-tail was barred, and that the Recoveror had a Fee-simple, which shall not determine, tho' A. die without Issue. 2 Lut. 1225.

(4.) But if the Tertenant grants a Rent de novo to A. in Tail, who suffers a Common Recovery, in this Case likewise the Recoveror hath a Fee-simple, but 'tis determinable upon the Death of A. without Issue; for the Rent was not perpetual in its Nature, and in such Case the Grantee shall not prejudice the Tertenant.

RECUSANT. *See* Prohibition.

RELEASE.

Lacy *verſus* Kinnaſton. Trin. 13 Will. III. B. R.

2 Salk. 573. A Releaſe of all his Right will not releaſe a Judgment not executed.

(1.) THIS Caſe is reported in * 2 Salk. by the Name of Clayton v. Kinnaſton, and in the * ſame Book by the Name of Lacy v. Kinnaſtone, but I do not find it ſtated any where, but only that it was held per Holt Ch. Juſt. that a Perpetual Covenant, as he calls it, (viz.) Never to take any Advantage of a Deed or Covenant, is a Releaſe or Defeaſance of that Deed or Covenant; as for Inſtance, where W. R. enters into an Obligation to H. S. who covenants never to take any Advantage or to ſue W. R. upon that Bond; if afterwards an Action of Debt ſhould be brought upon it, in ſuch Caſe W. R. the Obligor, may plead this Covenant in Bar to the Action, and this to avoid Circuity of Action, for the Obligee by this Covenant hath depriv'd himſelf of all the Remedy he can have upon this Bond; but if W. R and R. W. are jointly and ſeverally bound in a Bond to H. S. who Covenants never to ſue W. R. upon that Bond; this is no Releaſe or Defeaſance of the Bond, neither can it be pleaded in Bar, if an Action ſhould be brought on it, becauſe it doth not diſcharge the Right, but only the Remedy againſt W. R. for he ſtill hath a Right of Action againſt R. W. the other Obligor; therefore if he (the Obligee) ſhould bring an Action of Debt upon this Bond againſt W. R. he is put to his Action of Covenant againſt the Obligee, which would not lie if this Covenant was a Releaſe, becauſe a Releaſe to one Obligee is a Releaſe to both. And per Holt Ch. Juſt. a Releaſe of all his Right in ſuch Lands will not diſcharge a Judgment not executed, becauſe ſuch Judgment doth not give or veſt any Right, but only makes it obnoxious, and liable to Execution.

1 Lev. 43.

(2.) An Acquittance in Law ought to be a Deed ſealed, but the Common Practice is otherwiſe; an Acquittance for Rent due at Michaelmas laſt, is a good Diſcharge of all former Arrears; but 'tis otherwiſe in an Avowry.

REMAINDER.

(1.) A Contingent Remainder cannot depend upon an Eſtate for Years, becauſe it would make an Abeyance of the Freehold, which the Law will never endure.

(2.) Neither can it depend upon an Eſtate in Fee, becauſe after ſuch a Diſpoſal the Owner hath no Eſtate left to limit.

(3.) But it may depend upon an Eſtate for Life, or upon an Eſtate Tail, becauſe thoſe are but particular Eſtates, and a * bare Right of Entry will preſerve it. * 2 Lev. 35.

(4.) The Caſe was, T. P. and W. H. were Jointenants for Life, Remainder to the firſt Son of T. P. &c. Remainder to the right Heirs of T. P. afterwards the other Jointenant for Life releaſed to T. P. the Queſtion was, whether the contingent Remainder to the firſt Son of T. P. was deſtroyed by the Deſcent of the Inheritance to him as Heir at Law to T. P. and adjudged that it was, becauſe, by the Releaſe of the Jointenant for Life to the other, (viz.) to T. P. the Fee was executed in T. P. the Releaſee, and there was no particular Eſtate left in that Jointenant to ſupport this Remainder. Raym. 415. 1 Vent. 345. Jones 136.

(5.) The Husband being ſeiſed in Fee, deviſed to his Wife for Life, Remainder to her firſt Son, Remainder to his own right Heirs; the Husband died and the Widow married again, and ſhe and her Husband, before a Son was born, levied a Fine to one Weſton in Fee, the Heir at Law of the Teſtator having before that Time by Bargain and Sale, and Fine, conveyed the Lands to the ſaid Husband and Wife: adjudged, that the contingent Remainder to the Son was deſtroyed, becauſe the Reverſion in Fee being immediately, upon the Death of the Teſtator, in his Heir at Law; and that Reverſion being conveyed by him to the Wife by Bargain and Sale, and Fine, and ſhe having the particular Eſtate for Life, that Eſtate for Life was merged in the Conveyance of the Inheritance to her and her Husband; and by Conſequence, when the Remainder came in Being, there was nothing to ſupport it; for it ſhall not be preſerved by the Poſſibility which the Wife had to waive the Eſtate conveyed to her by the Bargain and Sale, &c. after the Death of her Husband. 2 Saund. 385. 2 Lev. 39.

Thompſon *verſus* Leech.

3 Lev. 284. 3 Mod. 296. 2 Salk. 517, 618. 2 Vent.

(6.) THIS Caſe is repoꝛted afterwards and in ſeveral Books, quod vide in the Margin: But per Holt Ch. Juſt. where there is a Tenant foꝛ Life, with a contingent Remainder, and he (the Tenant foꝛ Life) makes a Feoffment in Fee upon Condition, and the Contingency happens befoꝛe the Condition is bꝛoken; in ſuch Caſe the Contingency is foꝛ ever deſtroyed, becauſe there muſt be a particular Eſtate in Being, oꝛ a preſent Right of Entry when the Contingency happens.

(7.) But if the Tenant foꝛ Life enters foꝛ Bꝛeach of the Condition befoꝛe the Contingency happens, then the Contingency is revived and may veſt.

(8.) Where there is Tenant foꝛ Life with a contingent Remainder to W. R. and then Tenant foꝛ Life is diſſeiſed, and after that a Deſcent and five Years is caſt; now in ſuch Caſe the contingent Remainder is gone, becauſe there is nothing left to ſuppoꝛt it, foꝛ the Right of Entry is turned into a Right of Action.

Doddington *verſus* Kyme.

(9.) ADjudged, that after a contingent mean Remainder is once limited, no Eſtate after limited can be veſted, but when a contingent mean Remainder is not in Fee, but only foꝛ Life, oꝛ in Tail, an Eſtate after limited by ſubſequent Woꝛds may be veſted, as in Lewis Bowles's Caſe.

But if Lands are deviſed to A. foꝛ Life, and if he hath Iſſue a Son, then to that Son in Fee; and if he hath no Son, then to B. and his Heiꝛs, no Eſtate ſhall veſt in B.

Thomſon *verſus* Leech. Hill. 9 Will. III. B. R.

Where the Acts of an Ideot are void, and where voidable.

(10.) SImon Leech being Tenant for Life, Remainder in Tail to his firſt Son, Remainder to Sir Simon in Tail; ſurrendered to Sir Simon, and afterwards had Iſſue a Son; and it was found, that the Father was Non Compos when he made this Surrender.

It was inſiſted, that this Surrender was not void, but only voidable; foꝛ as to himſelf he cannot avoid it by Entry oꝛ by Pleading, oꝛ by the Writ Dum non fuit compos, which Writ being

being to avoid his own Alienations, ſuppoſes that he demiſit, and ſo doth the Writ De Ideota inquirend', and the Law needs not preſcribe Methods to avoid his Acts, if they are void in themſelves.

But it was anſwered and reſolved per Holt Ch. Juſt. That the Deed of a Perſon Non Compos is void, that if he Grants a Rent, and the Grantee diſtrains for the Arrears, he may bring Treſpaſs, that his Letter of Attorney or his Bond are void; 'tis true, the Books ſay generally, that his Deeds or Bonds are not void, but that muſt be underſtood, as that the Obligor cannot plead Non eſt factum, becauſe it appears to be a Deed fairly executed, but 'tis of no Force, becauſe of this latent Defect or Incapacity, which the Law requires ſhould be pleaded, and put in Iſſue ſpecially, and ſo are all his Acts in Pais, except his Feoffments, and Livery and Seiſin, and thoſe are only voidable; the Reaſon is, becauſe of the Reſpect the Law gives to a Feoffment upon the Account of its Solemnity in the Tranſmutation of a Freehold; and the Writ De non compos mentis, which ſays Demiſit, that muſt be underſtood of a Feoffment or a Fine, thoſe being the antient and the only Conveyances at that Time: An Infant runs parallel with an Ideot in all Caſes but this, (viz.) that an Ideot is not admitted to diſable or ſtultify himſelf: And laſtly, his Deeds are void, becauſe the Law hath appointed no act to be done for the avoiding them; therefore this Deed of Surrender being void, the particular Eſtate for Life was not determined by it, and by Conſequence the contingent Remainder not deſtroyed.

(11.) The Attorney-General exhibited a Bill in Equity againſt the Defendant, to make him accompt to a Lunatick, and to avoid a Bargain made by him, and this was held good, tho' the Lunatick was no Party; for tho' 'tis generally true, that he ought to be made a Party, yet not in this Caſe, becauſe it would be to ſtultify himſelf.

1 Ch. Rep. 112, 153. Where a Lunatick is to be made a Party, where not.

But where a Bill is brought in Nature of an Information by the Attorney-General in Behalf of a Lunatick, there he ought to be made a Party, if 'tis not directly to ſtultify himſelf, as in the Caſe of an Infant, for he may recover his Underſtanding, and then he is to have his Eſtate at his own Diſpoſal.

RENT.

RENT.

Tregarne *versus* Fletcher. Hill. 8 Will. III. B. R.

2 Salk. 676. By the Name of *Tregame* v. *Fletcher*. Where the Pleading *inter alia* is not good. *Antea* Pleas 1. S. P.

(1.) THIS Case is reported in 2 Salk. but quite different: If. In Replevin, the Defendant avowed, for that a Rent was granted to him issuing out of Black-acre, inter alia, &c. and that the Rent being in Arrear, he distrained in Black-acre prædict'; and upon a Demurrer to this Plea it was adjudged ill, for per Holt Ch. Just. he ought to have set forth the Grant it self, that the Plaintiff might discern it and have an Opportunity to reply an Entry, Eviction, or Recovery, to avoid the Defendant's Title, and the rather, because this was in the Case of a Rent-charge, for in an Assise for such a Rent all the Tertenants must be named; besides, the Rent is intire and issues out of every Parcel of the Land charged therewith, so that those Words inter alia shew an Incertainty upon the Face of the Plea it self.

Marckar *versus* Harris. Mich. 4 Will. III. B. R.

Where *Nil habuit in tenementis* is a good Plea to an Action of Debt for Rent. See *Postea* Replevin 1. *See* 3 Lev. 193. *Aylett* v. *Williams* and *Lee*.

(2.) IN an Action of Debt for Rent, the Defendant pleaded, that the Plaintiff Nil habuit in tenementis, &c. The Plaintiff replied, that he was possessed of a Lease in the Tenements for forty Years, made to him by the Lord Wootton, who had Power to demise the same; and upon a Demurrer to this Replication it was adjudged good, without setting out the * Title, for Nil habuit in tenementis is the Issue, and the Plaintiff might reply, Quod satis habuit in tenementis, (viz.) in Fee, or in Tail, &c. and Evidence might be given at the Trial of any other Estate; for where the Issue is Nil habuit in tenementis, the particular Estate alledged in the Pleadings is only Form.

1 Roll. Rep. 80.

(3.) The Lessor made a Lease, (viz.) in Consideration of the Payment of the Rent herein after mentioned, he leased, &c. and afterwards in this Lease the Lessee covenanted with the Lessor, his Heirs and Assigns, to pay 10 l. yearly: adjudged, this was a Rent and not a Sum in Gross; for as a Contract is actus contra

 actum,

actum, ſo a Covenant is convenire, which ex vi Termini ought to be on both Sides, therefore the Word Covenant muſt relate to both.

(4.) In Debt for Rent, the Plaintiff declared on a Leaſe at Will, dated 25th March, rendering 10l. Rent by quarterly Payments, and that he (the Defendant) entred, and was poſſeſſed till Chriſtmas, following, and for 50 s. for a Quarter's Rent, ending at Chriſtmas this Action was brought; and upon a Demurrer to the Declaration, it was objected againſt the Plaintiff, that he had ſued for a Quarter's Rent due at Chriſtmas, when two Quarters more were due, (viz.) Midſummer and Michaelmas Rent, and ſo the Action was brought for leſs than was due, without ſhewing how the Reſt was diſcharged: Sed per Curiam, every Quarter's Rent is a ſeveral Debt, for which diſtinct Actions may be brought; and ſo not like an Action of Debt for Part of the Money upon an entire Contract. 2 Vent. 129. Where an Action of Debt is brought upon an entire Contract, and where not.

(5.) Leaſe to the Defendant for twenty one Years, rendring Rent, afterwards the Leſſor, who had the Fee, granted the Rent to the Plaintiff, but not the Reverſion, and the Grantee of this Rent brought an Action of Debt for the Rent Arrear; the Defendant pleaded Nil debet, upon which they were at Iſſue, and the Plaintiff had a Verdict; the Court was divided, whether an Action of Debt would lie; two Judges of Opinion, that it did not, becauſe there was no Privity of Contract between the Grantee of the Rent, and the Leſſee; two other Judges of another Opinion, becauſe the Rent was originally ſubject to an Action of Debt, and tho' 'tis now in another, (viz.) in the Hands of the Grantee, yet the Law is ſtill the ſame; beſides, here is a Privity of Contract between them, becauſe the Leſſee having attorned to the Grantee of the Rent, this Attornment is quaſi a new Contract between them. See the Caſe of Ards v. Watkyns. Raym. 11. Whether Debt will lie where there is no Privity of Contract.

(6.) If Tenant in Fee or in Tail die, his Executor may have an Action of Debt by the Statute 32 H. 8. for the Rent Arrear, and due in the Life-Time of the Teſtator, or he may diſtrain; but before this Act the Executor had no Remedy at Common Law. Remedies by the Statute 32 H. 8. cap. 7. See the Caſe of *Howell* v. *Bell.*

(7.) So it was in the Caſe of a Tenant pur auter vie, for his Executor had no Remedy till the Death of Ceſtui que vie; but now he may diſtrain, or have an Action of Debt for the Rent Arrear. 1 Cro. 471.

(8.) If

(8.) If Tenant for Life die, his Executor might bring an Action of Debt for the Rent Arrear, and this was his Remedy at Common Law; but a new Remedy is given by this Statute, and that is to distrain.

(9.) But if a Grantee of a Rent for twenty Years, if he so long live, and there is Rent in Arrear, and then the Grantee dies, his Executor cannot distrain for the Arrears within this Statute, but must keep to his Remedy at Common Law.

(10.) If Tenant in Fee had made a Lease for Years, he or his Executors might have an Action of Debt at Common Law for the Rent Arrear, but not if he had made a Gift in Tail, or Lease for Life; because in such Case the Rent is a Freehold, and an Action of Debt being only a personal Action, lies only for a Chattel Interest: But now an Executor may bring Debt within this Statute, but this must be intended where the Rent issues out of Freehold, and not Copyhold Lands.

Yelv. 135.

(11.) Lessee for Years died Intestate, his Administrator made an Underlease to W. R. and died: Adjudged, that his Executor or Administrator may have an Action of Debt for the Rent Arrear upon the Underlease, and not the Administrator de Bonis non of the Lessee, tho' he hath the Reversion, for he comes in by a Collateral Title paramount the Lease.

Vent. 259.

REPLEADER. *See* Default, 1.

Witts *versus* Polehampton. Mich. 10 Will. III. B. R.

(1.) PER Holt Ch. Just. Where the Plea of the Defendant confesses the Duty for which the Plaintiff declared, but doth not sufficiently avoid it, and thereupon Issue is joined on an immaterial Thing, if 'tis found for the Plaintiff, he shall have Judgment, tho' the Issue was immaterial; but where the Defendant's Plea avoids the Plaintiff's Duty, who replies and traverses a Matter not material, and Issue is taken upon such * immaterial Traverse, and 'tis found for him, the Statute of Jeofailes will not help in such Case; but there must be a Repleader.

Difference where the Issue is immaterial, and where 'tis taken upon an immaterial Traverse.
* Cro. Eliz. 24, 104. 5 Rep. *Nicholls's Case.* 2 Cro. 5.

(2.) Trover against Husband and Wife, upon the Conversion made by the Wife to her own Use, they pleaded, quod ipsi non sunt culpabiles, upon which they were at Issue, and the Plaintiff had a Verdict; but a Repleader was awarded, because the Wrong done being alledged to be done by the Wife, and none by the Husband, the Issue should have been quod ipsa non est culpabilis.

Where the Issue is immaterial.

(3.) But tho' a Repleader hath been allowed after a Verdict, as in the Case last mentioned, it was never yet allowed after a Demurrer; so it was reported by Mr. Latch; but since his Time it hath been allowed; as for Instance.

Repleader allowed after a Verdict, but never after a Demurrer. Latch 147.

(4.) In a Quantum meruit by a Surgeon for curing a Wound, the Defendant pleaded a Tender of two Guineas Value 45 s. which was sufficient and traversed, that the Plaintiff deserved more; and upon a Demurrer to this Plea it was adjudged to be ill, because the Traverse made it double and impertinent; besides no such Value could be set on Guineas, and a Repleader was awarded, but without a Traverse, and the Plea was to be of a Tender of 45 s. and Issue to be taken of the Sufficiency thereof; 'tis true, it hath been often denied, that any Repleader

3 Lev. 440. Repleader allowed after a Demurrer argued.

should be after a Demurrer, but only after Issue joined; but here it was not only after a Demurrer, but after that Demurrer was argued.

Mod. Cases, 102. No Repleader after a Demurrer, nor a Writ of Error.

(5.) And yet since this last Case it hath been ruled, that a Repleader can never be awarded after a Demurrer, nor after a Writ of Error, but only after Issue joined.

Replevin and Avowry.

Challoner *versus* Clayton. Pasch. 10 Will. III.

In Replevin the Defendant avowed and did not set forth any Title, not good. See *Antea Rent* 2.

(1.) IN Replevin, the Defendant avowed for Rent, setting forth, that he was possessed of an House for several Years yet to come, and being so possessed, he demised it to the Plaintiff for one Year, rendring Rent, &c. The Plaintiff replied, that the Defendant Nihil habuit in Tenementis; the Defendant rejoined quod satis habuit, &c. and upon a Demurrer to this Rejoinder Mr. Northey moved to amend it, for that he could not make good his Avowry, there being no * Title set forth; 'tis true, in an Action of Debt for Rent reserved upon a Lease, the Defendant may plead Nihil habuit in Tenementis, and the Plaintiff in his Replication may shew Title, because quod cum dimisit is a sufficient Allegation in a Declaration; but in an Avowry a Title should be shewn, and therefore 'tis not proper in a Rejoinder.

* See *Freeman* v. *Fugg. Postea* 3.

Baker *versus* Lade. Mich. 4 Will. III. B. R.

5 Mod. Where a Deed must be pleaded as it operates by Law.

(2.) IN Replevin, the Defendant avowed for a Rent-Charge, setting forth, that his Father was seised in Fee, and in Consideration of 5 s. and natural Affection dedit & concessit the Reversion to him, that this Grant was without any Attornment, and that it did operate as a Covenant to stand seised, &c.

and upon a Demurrer, three Judges in the * Common Pleas held the Plea to be good by the Words Dedit & Conceſſit, becauſe the Court will judge what the Law is upon thoſe Words, (viz.) that it will amount to a Covenant to ſtand ſeiſed; but Pollexfen Ch. Juſt. held the Plea to be ill, for that the Defendant ought to have pleaded according to the Operation of this Deed by Law, (viz.) that his Father did covenant to ſtand ſeiſed, and not by the Words Dedit & Conceſſit; and thereupon a Writ of Error was brought in B. R. and according to the Opinion of Pollexfen, the Judgment was reverſed, (viz.) that this Deed ſhould have been pleaded according to the Operation of Law.

* 4 Mod. 149. 2 Vent. 260. 3 Lev. 291.

Freeman *verſus* Jugg. Trin. 12 Will. III. B. R.

(3) IN Replevin for taking a Horſe, the Defendant avowed, that he was poſſeſſed of the Cloſe, being the Locus in quo, &c. for a Term of Years yet to come, and being ſo poſſeſſed, the Horſe was Damage-feaſant there, &c. the Plaintiff replied, that the Defendant was to keep up his Fences round the ſaid Cloſe, but that the ſame being down, and out of Repair, the Horſe eſcaped into the Cloſe for Want of good Fences, upon which they were at Iſſue, and at the Trial the Plaintiff was Nonſuit; and now it was moved in Arreſt of Judgment, that this Avowry was ill, becauſe in all Avowries for Damage-feaſant, the Avowant muſt ſhew where the * Fee is, and how the particular Eſtate is derived, quod fuit conceſſum per Curiam, if there is a Demurrer to ſuch Avowry; but becauſe the Plaintiff by his Replication had waived that Matter, and confeſſed and admitted a Poſſeſſion in the Avowant, that is ſufficient to juſtify a Diſtreſs Damage-feaſant, and hath cured this Defect in the Avowry.

In Avowries for Damage-feaſant, the Avowant muſt ſhew where the Fee is, and how the particular Eſtate is derived.

* *See* Challoner *v.* Cleyton. *Antea* 1.

(4.) In Replevin, the General Iſſue is Non Cepit, but the Defendant may plead Property in himſelf, and this he may do, either in Bar or in Abatement to the Action; but if he plead Property in a Stranger, he muſt conclude in Abatement; and 'tis to be obſerved, that upon the General Iſſue, Property cannot be given in Evidence, therefore it muſt be pleaded there, as to the Plaintiff in Replevin, he muſt have a Property either general or ſpecial, and his Replevin muſt be either in Detinuit or Detinet; if in the firſt Caſe, then the Plaintiff hath his Goods again, and the Action is brought only for Damages in the Taking and Detaining; if 'tis brought in the Detinet, then 'tis where the Goods are ſtill detained from him.

Vent 249. In Replevin, the Defendant may plead Property either in Bar or Abatement.

2 Lut. 1151.

The Declaration muſt be not only of a Taking in a Hill or Town; but in quodam loco vocat', &c. otherwiſe 'tis naught upon a Demurrer, but ſuch a Declaration in an Action of Treſpaſs is good.

Litt. 37. Replevin for Taking ſeveral of his Beaſts in quibuſdam locis, called A. and B. upon a Demurrer to this Declaration it was held ill, becauſe the Plaintiff ought to ſhew how many were taken in one Place, and how many in another Place.

Jones 414. The Defendant in Replevin had no Damages given at Common Law, but this is by the Statute 7 and 21 H. 8.

REQUEST.

Reſolutions where a Special Requeſt is to be made, and where a General *Licet ſæpius requiſitus, &c.* is ſufficient.

Allen 25. (1.) IF I promiſe B. to deliver him two Pipes of Wine out of my Cellar, to be choſen by him, in ſuch Caſe he muſt make the Requeſt, but if I promiſe B. to deliver to C. two Pipes of Wine to be choſen by C. I muſt Requeſt him to chooſe them.

Noy 95. Latch 93, 209. 3 Leon. 200. (2.) Where a Man promiſeth to pay a precedent Duty, there Licet ſæpius requiſit' is ſufficient, becauſe there was a Duty without the Promiſe, as if one buy or borrow my Horſe, and promiſeth to pay ſo much upon Requeſt.

(3.) But if the Promiſe is collateral, as for Inſtance, to pay the Debt of a Stranger upon Requeſt; there the Requeſt is Part of the Agreement and traverſable, for there was no Duty before the Promiſe made, and for that Reaſon the Requeſt muſt be ſpecially alledged, for the Bringing the Action will not be a ſufficient * 1 Saund. 35. Requeſt; * ſo likewiſe where there are mutual Promiſes to pay each other 4 l. upon Requeſt, if they do not perform ſuch an Award, the Requeſt muſt be ſpecially alledged.

(4.) But as to this Matter, there is some Difference in the Action brought; for if I promise to redeliver, upon Request, such Goods as were delivered to me, there if an Action of Detinue is brought, the Plaintiff need not allege a Special Request, because there was a precedent Duty as aforesaid, and the Action is brought for the Thing it self.

(5.) But if an Action on the Case is brought for these Goods, then the Request must be specially alledged; for 'tis not brought for the Thing it self, but for Damages. Sid. 66.

(6.) Where a Promise is made to pay Money to the Plaintiff upon Request, there needs no special Request; but if the Promise was made to A. to pay B. so much Money upon Request; there must be a Special Request alledged; and so, if the Promise was made to the Plaintiff himself to do any collateral Act upon Request, as to purchase, &c. there must be a Special Request alledged.

Fitzhugh *versus* Dennington. Mich. 3 Annæ.

(7.) DEBT upon a Bond conditioned at the End of seven Years, to make the Plaintiff free of the Joiner's Company, if requested thereunto; the Defendant pleaded, that at the End of seven Years he was not requested, and upon Demurrer to this Plea the Defendant had Judgment, because the Request being to do a collateral Thing; and being Part of the Condition, ought to have been averred by the Plaintiff, which he had not done; 'tis true, it was objected against the Plea, that the Defendant should have pleaded generally, that he was not requested, but he had pleaded, that he was not requested at the End of seven Years, &c. it should have been before the End of seven Years: But per Curiam, the Condition was not to make the Plaintiff free, post terminum of seven Years, but ad terminum, and the End of a Thing is always Part of that of which 'tis an End, so that he was to be made free on the last Day of the seven Years, and to make a Request some Time of that Day, so that the Defendant might have a reasonable Time to procure it to be done. 2 Salk. 585. Where a Request is to do a collateral Thing, it must be averred.

(8.) The Defendant borrowed Money for the Use of his Mother, and gave Bond to pay it on Demand, if his Mother did not; and in an Action of Debt brought on this Bond, the Defendant after Oyer demurred to the Declaration, for that the Plaintiff did not lay any Special Request, when, and where he required the Mother to pay it, and that the general Allegation Licet sæpius Mod. Cases 200. Where there is a Duty before a Demand made, there *licet sæpius requisitus* is sufficient.

ſæpius requiſitus will not be ſufficient, which is very true, where there is no Duty till a Demand made; but per Curiam, here was a Duty ab initio, which the Law makes payable on Demand, and in ſuch Caſe 'tis not neceſſary to alledge an expreſs Demand.

1 Vent. 71, 74. Where a ſpecial Requeſt need not be alledged.

(9.) Caſe, &c. in which the Plaintiff declared, that T. S. owed him 20l. and that the Defendant owed T. S. 20l. and that in Conſideration, the Plaintiff, at the Special Inſtance and Requeſt of the Defendant would procure an Order from T. S. directed to the Defendant, to pay the 20l. to the Plaintiff; he the Defendant promiſed to pay it, that accordingly, he (the Plaintiff) did procure an Order, &c. which he ſhewed to the Defendant, and required him to pay the Money, which he refuſed; and upon a Demurrer to this Declaration it was objected, that he did not alledge that he procured this Order at the Requeſt of the Defendant, and ſince the Promiſe was not made on a Conſideration of a Duty to the Plaintiff himſelf, but in Conſideration of a collateral Duty which became due upon a Special Promiſe, therefore a Requeſt ſhould be alledged to pay the Money, and both the Time and Place ſet forth ſpecially: Sed per Curiam, no other Requeſt is neceſſary than what is ſet forth in the Agreement, (viz.) that the Plaintiff, at the Requeſt of the Defendant, did procure the Order, and no ſubſequent Requeſt was intended.

RESCOUS.

Anonymus. Mich. 8 Will. III. C. B.

(1.) PER Treby Ch. Juſt. of C. B. upon an unlawful Diſtreſs, the Owner of the Cattle may reſcue them before impounding, but not after.

2 Lev. 26.

(2.) Reſcous was returned to be done to the Bailiff: Et per Curiam, 'tis good, whether he be Bailiff of a Franchiſe, or the Sheriff's Bailiff.

(3.) Case against the Sheriff upon an Escape on mesne Process, the Defendant pleaded a Rescous, and upon a Demurrer to this Plea he had Judgment, tho' he did not set forth, that the Rescous was returned. 3 Lev. 46.

(4.) Where a Bailiff hath a Warrant to arrest a Man, and is hindered in the Execution of his Office, this is no Rescous unless there was an actual Arrest; but 'tis a Misdemeanor and Contempt of that Court out of which the Process issues. Mod. Cases, 210.

(5.) Case against the Defendant for a Rescous upon mesne Process; the Evidence at the Trial was, that the Bailiff stood at the Street Door, and sent his Follower up three Pair of Stairs in a disguised Habit, with the Warrant, who laid Hands on W. R. and told him, that he arrested him; but W. R. with the Help of some Women got from the Follower and ran down Stairs, and the Defendant hearing a Noise, run up and put the said W. R. into a Room, then locked the Door and would not suffer the Bailiff to enter. Holt Ch. Just. doubted whether this was a lawful Arrest, being by the Bailiff's Servant or Follower, and not in the Presence of the Bailiff himself; but said, that the Plaintiff must prove his Cause of Action against W. R. and that he must prove the Writ and Warrant, by producing sworn Copies of them, and he must prove the Manner of the Arrest, that it may appear to the Court to be a lawful Arrest; and in Point of Damages, he must likewise prove the Loss of his Debt, (viz.) that W. R. became insolvent, or could not be retaken. Mod. Cases, 211. What is a Rescous.

RE-

RESERVATION.

1 Vent. 161. Reservation, what it is.

(1.) A Reservation is a Kind of a Return of something back in Retribution of what passes away; and therefore whatever it is, it shall be carried over to him who should have succeeded to the Estate, or to the Thing demised, if no Lease had been made; and therefore, where a Man seised in Fee makes a Lease for Years, reserving Rent, this Rent is descendable to the Heir, as the Land it self out of which it Issues doth descend, because it comes in Lieu of that which should have descended.

2 Saund.

(2.) The Tenant in Fee-simple made a Lease for Years, reserving Rent to him and to his Executors; per Curiam, the Rent shall not go to them, because 'tis not a Testamentary Estate, and therefore it shall determine with the Life of the Lessor.

(3.) So if Lessee for 100 Years, make a Lease for forty Years, rendring Rent to him and his Heirs, this is void as to his Heirs, and shall likewise determine with the Life of the Lessor.

(5.) So likewise, if the Rent is reserved to himself, without any other additional Words, because the Rent is a new Creature, and cannot have a longer Duration than its Creation gave it.

1 Vent. 162.

(5.) But if Tenant in Fee make a Lease for Years, reserving Rent to him and his Assigns, this shall go to his Heirs.

(6.) If 'tis reserved to him and his Assignes durante Termino, &c. or to him durante Termino, or to him and his Executors durante Termino; in these Cases those Additional Words shew, that the Rent should continue to be paid as long as the Term is in Being, and in such Case, it shall descend with the Reversion to the Heir at Law, and the Word Executor is void, and the Reservation shall be as if it had been to him only during the Term.

1 Vent. 172.

(7.) Lessee for Years surrendered to the Lessor by Parol, reserving a Rent: Adjudged, that this was a good Reservation upon the Contract, and that an Action of Debt would lie for the Rent after the first Day of Payment incurred, tho' the

Reſervation was by Way of Contract, and without any Deed.

RESTITUTION.

The King verſus Harris. Trin. 11 Will. III. B. R.

(1.) THE Caſe was, Harris was ouſted by a Vi Liaca amovendo, and Morgan put into Poſſeſſion; afterwards Harris got the Juſtices of the Peace to inquire into the Force, and accordingly, on the 20th of October, 1695. an Inquiſition was taken, by which it was found, that Morgan forcibly entered and detained the Church, and about three Years and two Months after this Inquiſition was taken, (viz.) in December, 1698. the Juſtices awarded a Precept to reſtore Harris, which was executed; and thereupon Morgan bought a Certiorari, to remove this Inquiſition into B. R. and a Writ of Reſtitution was awarded, with this Entry, Quia conſtat nobis ſuper ſeparalia Sacramenta, quod Reſtitutio ſuperinde was not made, till three Years after the Inquiſition taken, &c. for the Statute intended a ſpeedy Remedy for the Poſſeſſion, which was loſt, without trying the Right, and an Execution ſo long after is not a freſh Purſuit, and might be dangerous to Purchaſers; and 'tis in this Caſe as in the Caſe of a Conviction of a Forcible Entry upon View, upon the Statute * 15 Rich. 2. where the Commitment muſt be made preſently.

5 Mod. 443. Where Reſtitution was not made till three Years after the Inquiſition, 'tis not good.

* 15 Rich. 2. cap.

(2.) The Defendant's Goods were ſeiſed, being imported contrary to the Act of Navigation, and afterwards the Property was claimed by C. and others; and the Queſtion was, whether the Court ought to grant Writs of Reſtitution, ex debito Juſtitiæ, upon giving Security; and adjudged not, for 'tis diſcretionary in the Court, and if granted, 'tis ex gratia.

Hardr. 97. Where a Writ of Reſtitution is *ex gratia.*

Formerly the King never proceeded on an Indictment till a Year after the Offence, that the Party might bring an Appeal.

(3) At Common Law where Goods were feloniouſly taken away, the Owner had no Remedy to recover them but by Appeal; and therefore, if the Party was indicted before the Appeal brought, and either convicted or acquitted, the Appeal was barred, and conſequently the Owner loſt his Goods for ever; for if convicted, they were forfeited to the King, and if acquitted, that was a good Bar to the Appeal; therefore in Favour to the Owner, and to give him a reaſonable Time to bring his Appeal, the King ſeldom proceeded by Way of Indictment till a full Year after the Offence done. But then there was this Inconvenience, that the King's Evidence were either kept Secret or died, and the Party would bring no Appeal; therefore by the Statute 21 H. 8. cap. 11. the Owner had the ſame Advantage upon a Conviction as he had upon the Appeal (viz) that a Writ of Reſtitution ſhould be awarded as well upon a Conviction on an Indictment, as on an Appeal.

Returns of Proceſs.

Yelv. 34. Before the Statute of *Ed.* 2. the Sheriff never put his Name to a Return.

(1.) Before the Statute of Ed. 2. the Sheriff or other Officer never put his Name to the Return, but now by that Statute he muſt do it; and therefore, as at Common Law, the Party might ſay, that the Sheriff did not make the Return, becauſe his Name was not endorſed, ſo he may ſtill, tho' his Name is endorſed, becauſe the Statute hath not taken away that Averment, for the Party may aver, that he who endorſed the Writ is not Sheriff.

Sid. 23. If he return *Cepi Corpus*, and hath not the Body ready, he ſhall be amerced. *Poſtea* 4. S. P.

(2.) At Common Law, if the Sheriff had made a Falſe Return, or no Return at all, an Action on the Caſe would lie againſt him.

(3.) But if he return Cepi Corpus, and hath not the Body ready at the Day, he ſhall be amerced till he have him, or aſſign the Bail-Bond to the Plaintiff, but no Action lies againſt him in this Caſe for a Falſe Return, becauſe he is compellable to take Bail. But if an Action ſhould be brought againſt him he ought not to demur to the Declaration, but to plead the Statute by which he is compellable to take Bail.

1 Vent. 55, 85.

(4.) Case against the Sheriffs of London and Middlesex, for a false Return of a Bill of Middlesex, which was Cepi Corpus and paratum habeo, when in Truth they had not the Body at the Day of the Return of the Writ; the Defendants pleaded the Statute 23 H. 6. that they took Bail for the Appearance of the Prisoner, and so discharged him, and that at the Day of the Return of the Writ, they returned Cepi Corpus, &c. The Plaintiff replied Protestando, that the Defendants did not take sufficient Bail, &c. and then pleaded, that they had not the Body ready; and upon a Demurrer to this Replication it was insisted for the Plaintiff, that tho' an Action for an Escape would not in this Case lie against the Sheriff, because he is enjoined by the Statute to take Bail, yet an Action for this false Return will lie: But per Curiam, at Common Law there was no other Return than Cepi Corpus, or Non est Inventus; and that this Statute makes no Alteration of the Returns; and by Consequence no Action lies against him for returning Cepi Corpus, and the Words Paratum habeo makes him liable to be amerced till he hath the Body.

1 Mod. 239. 2 Mod. 83. Where the Sheriff returns a *Cepi Corpus*, and hath not the Body ready, he shall be amerced. *Antea* 3. S. P.

REVOCATION.

Countess of Bridgwater *versus Duke of* Bolton.

(1.) IN this Case it was held by Powis Serjeant, and admitted by Mr. Cowper on the other Side, as often adjudged in Chancery, that where the Testator is seised in Fee, and by his Last Will deviseth his Lands to W. R. in Fee, and afterwards he mortgages the same Lands in Fee to W. W. and then dies before the Principal and Interest is paid, that this Mortgage doth not amount to a total Revocation of the Will, but only quoad so much, for which the Lands were mortgaged, and that the Devisee shall have the Equity of Redemption.

1 Salk. 236. Where a Man mortgages his Lands after he hath devised them by Will, 'tis only a Revocation, *quoad* so much as is mortgaged.

Hard. 375. Where a subsequent Will shall not revoke a former.

(2.) The Testator made a Will of Lands, and afterwards he made another Will, but it did not appear that any Lands were devised by this subsequent Will; and this Matter being found in a Special Verdict, Hale Ch. Just. held, that a second Will substantive, and independant of the first, is a Revocation thereof, whether 'tis consistent or not; but if it be depending on the first Will, or relative to it, 'tis not a Revocation so far as 'tis consistent, because it may be in Confirmation of the first Will; and this might be so in the principal Case, for any Thing appears to the contrary.

Where a Fine and Deed make a Revocation, when one will not do it.

(3.) A Settlement was made, and therein a Power was reserved to revoke by Indenture sealed in the Presence of three Witnesses; afterwards, the Party, without taking Notice of his Power, covenanted by Indenture to levy a Fine to other Uses, which Indenture was sealed in the Presence of three Witnesses, and afterwards a Fine was levied accordingly; the Question was, whether this was a Revocation of the first Settlement: Et per Curiam, the Covenant alone will not do it, because it raises no Uses, nor passes any Estate; and the Fine alone will not do it, because 'tis no Indenture in the strict Acceptation of the Word, but both together make a good Conveyance, and by Consequence a good Revocation.

1 Vent. 197. 1 Ch. Rep. 241. *contra.*

(4.) Where a Feoffment is made to Uses, with a Power to revoke and limit new Uses, there the Feoffor may revoke and limit in infinitum; but where the Power is only to revoke, there, when that Power is executed, he cannot limit new Uses.

RIOT.

Anonymus. Pasch. 1 Will. III. B. R.

(1.) PER Holt Ch. Just. an Indictment against W. R. for that he cum multis aliis at H. &c. did commit a Riot, is good.

(2.) Adjudged, that where Rioters are convicted upon View of two Justices, the Sheriff must be a Party to the Inquisition, upon the Statute 13 H. 4. but if they disperse themselves before Conviction, the Sheriff need not be a Party, for in such Case the two Justices may make the Inquisition without him, and this is pro Domino Rege; but if the Justices neglect to make an Inquisition within a Month after the Riot, they are punishable, but the Lapse of the Month doth not determine that Authority to make an Inquisition, but only subjects them to a Penalty for not doing it within that Time.

Where the Sheriff must be a Party to an Inquisition for a Riot, where not.

(3.) One Tempest, and two more, were convicted for a Riot, upon View of two Justices, and of the Sheriff of the County, contra formam Statuti, and they were fined by the two Justices; and upon a Writ of Error brought, the Error assigned was, that the Sheriff did not join with the Justices in setting the Fine, when the Statute expressly requires, that he should be joined with the Justices in the whole Proceedings, and for this Cause the Judgment was reversed.

Raym. 386.

13 H. 4. cap. 7.

(4) Several were indicted for a Riot, it was moved, that the Prosecutor might Name two or three, and try it against them, and that the rest might enter into a Rule to plead Not guilty, and a Rule was made accordingly, this being to prevent the Charges in putting them all to plead.

Mod. Cases 212.

School

School and School-master.

Matthews *verſus* Burdett. Hill. 1 Annæ.

2 Salk. 672. The Biſhop is to licenſe School-maſters.
* Styl. Origines 210, 211, 212. Linwood 282. Poph. 170. Noy 184. Hutt. 100. Spar. Coll. 79, 179, 225. 1 Mod. 3. *See* Codex, Lib. 10. Tit. 52. Spelman Concilia 2. Voll. 176.

(1.) IN a Prohibition, &c. for teaching School without a Licence: This Caſe is reported in 2 Salk. to which may be added Mr. Cowper's Argument againſt the Prohibition, (viz.) That it appears by the Books and Authorities in the * Margin, that the licenſing School-maſters, &c. belonged to the Biſhop; and by the Statute 2 H. 4. cap. 15. not printed, the Biſhop may puniſh ſuch as teach School without Licence; that 'tis very neceſſary ſuch a Care and Power ſhould be lodged ſomewhere, and in no Perſon fitter than the Biſhop, and therefore he had, Time out of Mind, exerciſed this Power of licenſing and puniſhing thoſe who teach without Licenſe, and that no other Perſon pretended to any Power to regulate in this Matter, excepting only the Biſhop, and this both before and ſince the Reformation, that an immemorial Uſage did veſt a Right as well in the Spiritual as Temporal Courts, and that a legal Foundation muſt be intended for ſuch an Uſage, and even an Act of Parliament for that Purpoſe, if nothing elſe would be ſufficient.

Dr. Lake, a Civilian, econtra argued, that amongſt the Romans there was a Jus Pontificum, but Schools did not belong to them, for School-maſters were put in by the ſupreme Magiſtrate of the Town, and he it was that paid them.

'Tis true, amongſt the Chriſtians, the Biſhops did erect Schools, and did appoint School-maſters, and paid them, but this was when the Biſhop received the whole Eccleſiaſtical Revenue, which was then wholly ſubject to his Appointment, out of which Part was appropriated for the Maintenance of Schools and of the Clergy, but thoſe were Schools of Divinity, and ſo not like the principal Caſe, and few were permitted to be School-maſters, unleſs they were Churchmen.

2 Lev. 222.
* 13 Car. 2.

(2.) Libel in the Spiritual Court for teaching School without a Licenſe; and upon a Motion for a Prohibition it was denied, for tho' the Act of * Uniformity gives the Penalty of 5 l. for this Offence, yet it doth not deprive the Eccleſiaſtical Courts of their

Jurisdiction in such Cases, when they proceed according to the Canon, and not upon this Act for the Penalty; and the Canons made Anno 21 Jac. and in the Year 1571. before his Reign, are made good and valid by the Statute * 25 H. 8. so long as they are not against the Common Law, or the King's Prerogative, and a Licence of a School by a Bishop, is against neither.

See Cro. Car. 229. 1 Mod. 21. Jones 320. * Cap. 19.

SCIRE FACIAS.

Withers *versus* Harris. Mich. 1 Annæ.

(1) JUdgment in Ejectment, and after a Year and a Day there was an Habere facias possessionem, without bringing a Scire facias, and adjudged, that it * ought to be brought as well against the Tertenants as the Defendant; because as to the Possession an Ejectment is a real Action, it binds the Right if the Plaintiff recovers, and makes a good Title: And Holt Ch. Just. said, that he was not satisfied with that Opinion of my Lord Coke, upon the the Statute of Westm. 2. that by the Common Law a Scire facias would not lie upon a Judgment even in personal Actions, because those general Words sive alia quæcunque irrotulata, coming after the Words conventus contracta, &c. which are in their own Nature inferior to Judgments, cannot extend to Judgments which are Superior; but the Law having been taken to be otherwise, he would not argue gainst it.

Farr. 50. 1 Salk. 258. *Sid. 317, 361. Judgment in Ejectment after a Year and a Day, a *Scire facias* must be brought before an *Habere facias possessionem.*

Anonymus. Mich. 1 Annæ.

(2.) AFter Judgment in Ejectment, where there are more Plaintiffs or Defendants than one, after the Death of one of them, Execution may be taken out by the Survivors, without a Scire facias, upon making a Suggestion on the Roll, that one of them is dead; but it may be a Question, where there is but one Defendant, whether Execution can be taken after his Death, without a Scire facias.

Judgment in Ejectment, one dies, Execution may be taken by the Survivors.

Snow

Snow *verſus Manucaptors of* Firebraſs. Mich. 1 Annæ.

Scire facias againſt the Bail, for that the Principal had not rendered himſelf *priſonæ Mareſcalli*, &c.

(3.) SCire facias againſt the Bail; the Breach aſſigned in the Writ was, that the Principal had not rendered himſelf priſonæ Mareſcalli mareſcalciæ Domini Regis, omitting the Words which uſually follow, (viz.) coram ipſo Rege; and for this Omiſſion it was inſiſted, that the Writ was not good, for the King has another Marſhal, and that is the Marſhal of the Houſhold. Sed per Holt Ch. Juſt. & Powel Juſt. The Earl Marſhal of England, by his Office, is Marſhal of the King's Bench, as appears by the Book of H. 6. and ſo it continued till the Reign of King James the firſt, when the Office Mareſcalli mareſcalciæ, was derived out of it; ſo that the Marſhal of the King is the Marſhal of the King's Bench, and no other Perſon can be underſtood by it; the other is Mareſcallus Hoſpitii, and never mentioned without that Addition.

Manning *verſus* Bois. Hill. 2 & 3 Will. & Mar. Rot. 645. C. B.

Scire facias returnable on ſuch a Day, *ubicunq; tunc fuerimus*, not good.

(4.) AFter a Writ of Error brought on a Judgment in C. B. there was a Sci' fa' Teſte 28 Novemb. returnable die veneris proxime poſt Octabis Sancti Hillari, ubicunque tunc fuerimus in Anglia, to ſhew Cauſe quare Executionem non habet; to which the Defendant demurred, and it was held, that ſuch Writs of Sci' fa' were made returnable ſometimes at a Day certain, and ſometimes upon Common Days; but that this Writ returnable on a Day certain, ubicunque, &c. was naught, for it ought to be returnable on a Common Day, if it be coram nobis ubicunque, &c.

Guillam *verſus* Hardiſty. Paſch. 9 Will. III. B. R.

Scire facias, reciting a Judgment in an Inferior Court, *ſicut per inſpectionem*, ill.

(5) PER Holt Ch. Juſt. and the Court, where a Sci' fa' is brought in B. R. upon a Judgment in an Inferior Court, it muſt appear in the Writ it ſelf, how the Judgment came into B. R. (viz.) whether by Certiorari, or by Writ of Error, becauſe the Execution is different; for if it came in by Certiorari the Sci' fa' muſt ſet forth the Limits of the Inferior Jurisdiction, and pray Execution within thoſe particular Limits, and alſo that the Judgment came in by Certiorari, but if it came in by Writ of Error, that muſt be ſhewn in the Sci' fa' it ſelf likewiſe, and pray

Execution generally: And whereas the Sci' fa' in the Principal Case recited the Judgment in the Inferior Court, ſicut per inſpectionem Recordi nobis conſtat, it was for that Reaſon ill; for it ought to be ſicut patet per Recordum, becauſe if the Defendant ſhould plead Nul tiel Record, it muſt be tried by the Record it ſelf, and not by Inſpection, ſo this Scire facias was quaſhed.

Adams *verſus Tertenants of* Savage. Mich. 3 Annæ.

(6.) IN this Caſe (which ſee 1 Salk. 40. it was held by Holt Ch. Juſt. That where a Scire facias brought againſt Tertenants is General, as uſually it is in C. B. 'tis not proper for the Defendant to plead in Abatement, that there are other Tertenants not named, and ſo pray Judgment of the Writ, & quod breve prædict' caſſetur; but to pray Judgment, if without them, reſpondere debet; but where the Scire facias is Particular (i. e.) naming the particular Tenants, in ſuch Caſe the Defendant may pray Judgment of the Writ, and there being ſome Doubt, whether the Tertenants could plead other Tertenants in another County not named, &c. The Chief Juſt. cited * Owen's Reports, that Tenant for Years might be a good Tenant to plead in Bar to a Scire facias in a perſonal Action, where Damages are to be recovered, but not to a Scire facias in a real Action.

1 Salk. 40. Where a *Scire facias* againſt Tertenants is General, 'tis not proper for the Defendant to plead in Abatement, that there are other Tertenants. 2 Cro. 506. Co. Ent. 624. Cro. Eliz. 740. Moor 524. 2 Saund. 8. Palm. 241. 2 Roll. Rep. 53.

* Owen 104.

(7.) At Common Law a Scire facias would lie upon a Judgment in a real Action, becauſe the Party could have no new Original; but it would not lie upon a Judgment in a perſonal Action till the Statute of Weſtm' 2.

On what Judgment a *Scire facias* would lie at Common Law, and what not. Sid. 53.

(8.) Where a Judgment has ſlept a Year and a Day, the Party ſhall not have either a Ca. ſa. or Fi. fa. but is put to his Action of Debt upon the Judgment, or to a Scire facias, unleſs he continued the Proceſs, or the Defendant brought a Writ of Error, and the Judgment was affirmed, for this is a Reviver; but it may be a Queſtion, if the Writ of Error be diſcontinued, or the Plaintiff in Error be Nonſuit.

After a Judgment is a Year old, the Plaintiff may have an Action of Debt, or a *Scire facias*. 1 Vent. 46.

(9.) Where a Scire facias is brought on a Judgment in B. R. the Plaintiff muſt ſhew where the Court of B. R. was held, becauſe that Court is Ambulatory, ubicunque fuerimus in Anglia; but if it be brought upon a Judgment in C. B. 'tis otherwiſe, becauſe the Court of Common Pleas is confined to a certain Place.

Difference where a *Scire facias* is brought on a Judgment in B. R. and in C. B.

Mod. Caſes, 14, 212. Where a Judgment by Warrant of Attorney is not entered within a Year after, it ſhall not be entered without Leave of the Court.

(10.) It was moved to ſet aſide an Execution, for that it was irregular, the Defendant alledging, that when he confeſſed the Judgment, the Plaintiff and he agreed, that Execution ſhould not be taken till after a Year; the Plaintiff inſiſted, that he had ſtaid a Year after the Defendant had given the Warrant of Attorney to confeſs Judgment; then the Queſtion was, whether the Year ſhould be computed from the Date of the Judgment, or from the Date of the Warrant of Attorney. Et per Curiam, It ſeems neceſſary that the Plaintiff ſhould bring a Scire facias ſince the Execution was delayed for more than a Year; however the Practice is, that if Judgment upon a Warrant of Attorney is not entred within a Year, it ſhall not be entred afterwards without Leave of the Court.

SHERIFF. *See* Diſſenters, 4.

(1) THE Sheriff is the King's Officer, and therefore is always made and appointed by the King, unleſs in Counties Palatine.

(2.) He hath Cuſtodiam Comitatus, and therefore hath an Authority to raiſe the Poſſe Comitatus to ſuppreſs Rebellions, Riots, &c.

(3.) He hath a Juriſdiction both in criminal and civil Caſes, and for this Purpoſe he hath two Courts, (viz.) his Tourn or View for criminal Cauſes, which is therefore the King's Court, becauſe Pleas of the Crown can be in no other than the King's Courts; the other is his County Court for civil Cauſes, and this is the Court of the Sheriff himſelf, and for this Reaſon 'tis called, the County Court.

Yelv. 45. Where he levies the Goods by a *Fi. fa.* he may ſell them, tho' he is out of his Office.

(4.) It was formerly held, that if he take Goods in Execution by Vertue of a Fi. fa. and is out of his Office before they are ſold, that in ſuch Caſe he could not ſell, and deliver the Money to the Party, becauſe his Authority determined with his Office; but he ought to deliver ſuch Money over to the new Sheriff, as he doth

the Priſoners, and return, that thereupon a Venditioni exponas may be awarded to the new Sheriff.

(5.) But ſince it hath been held, that tho' a new Sheriff is made, yet the old Sheriff may ſell the Goods ſo by him levied; but if he return the Writ, that the Goods are in his Hands pro defectu emptorum, in ſuch Caſe a Diſtringas ſhall go to him to deliver them over to the new Sheriff, and after that a Venditioni exponas. 1 Vent. 316.

(6.) Where he levies Money upon a Fieri Facias, the Plaintiff may have an Action of Debt againſt him for the Money, becauſe it was received by him to the Plaintiff's Uſe, and the Defendant is diſcharged of it; and it lies againſt his Executors, if he die, for this is not like an Eſcape, which is a Wrong done by the Sheriff himſelf, but 'tis founded on a Duty due and owing by the Sheriff, which ſhall ſurvive and charge his Executors. Cro. Car. 539. Perkinſon's *Caſe*. Where he levies Money by a *Fi. Fa.* the Party may have an Action of Debt againſt him.

(7.) The King appointed a Sheriff, and afterwards a Barony diſcended on him by the Death of his Father, his Office doth not determine, but he continues Sheriff notwithſtanding he is a Baron and Peer of the Realm. 3 Cro. 13. Mordant's *Caſe*. His Office doth not determine by the Deſcent of a Barony.

SIMONY.

(1.) THIS is ſtudioſa voluntas emendi vel vendendi ſpiritualia, vel ſpiritualibus annexa, and in the following Caſes may be ſeen what is Simony, and what is not.

(2.) In a Special Verdict in Ejectment, the Caſe was, an Uſurpation was made, and a Quare Impedit brought againſt the Incumbent, and pending that Writ the Plaintiff ſold the perpetual Advowſon to W. R. and the Jury found, that it was with Intention that H. C. ſhould be preſented after the Uſurper was removed, and accordingly he was preſented, inſtituted and inducted; the Plaintiff ſuppoſing the Preſentation to be void, got the King's Title, upon which he was admitted and inducted, and brought his Ejectment againſt the Defendant, and had Judgment; for per Curiam, the Defendant was in by Simony. 2 Vent. 38. Pending a *Quare Impedit*, the Plaintiff ſold the perpetual Advowſon to *W.* with an Intention that *H.* ſhould be preſented, 'tis Simony.

31 Eliz. c. 6. 2 Lutw. The King v. *Gibson.* The Patron was an Infant and a ſimoniacal Agreement was made with his Mother, he (the Infant) need not be named in the *Quare Impedit.*

(3.) In a Quare Impedit, the Plaintiff ſet forth the Statute againſt Simony, and that Thornden was a Benefice with Cure, which being void, a ſimoniacal Agreement was made with the Mother of the Patron, who was an Infant, and one Crew; that the Infant ſhould preſent Crew, and that in Conſideration thereof he ſhould pay to her 250 l. &c. The Defendant pleaded in Abatement, that he claimed nothing in the Benefice, but upon the Preſentation of the Infant W. W. who is not named and made Defendant; and upon a Demurrer to this Plea it was adjudged, that where the Right of the Patron is not to be diveſted by the Judgment, there he need not be named in the Writ; now in this Caſe there was no Complaint againſt the Patron, for it was not he, but the Simoniſt, who is the Diſturber, and therefore he need not be made a Defendant.

(4.) In the laſt Caſe the Statute againſt Simony is recited, but in the following Caſe 'tis not.

2 Lutw. The King v. Biſhop of *Chicheſter. Quare Impedit* good, tho' the Statute againſt Simony is not recited.

ſſ. In a Quare Impedit againſt the Ordinary, Patron, and Incumbent, to preſent to the Church, &c. ſetting forth, that 'tis a Benefice with Cure, &c. and that in 1681, it became void by the Death of the Incumbent, &c. then he ſets forth, that during the Avoidance there was a ſimoniacal Agreement by which the preſent Incumbent was preſented, &c. The Biſhop pleads, that he claims nothing but as Ordinary; the Patron demurred to the Declaration, and the Incumbent pleaded, that he was Parſon Imparſonee, upon the Preſentation of the other Defendant, the Patron, and traverſed the ſimoniacal Agreement; the Plaintiff replied, and prayed Judgment againſt the Ordinary, and took Iſſue upon the Traverſe of Simony, and joined in Demurrer with the Patron; and it was objected againſt the Declaration, that the Statute againſt Simony was not recited therein, for ſo are all the Precedents: Sed per Curiam, non allocatur.

Sid. 329. Simony, where neither the Patron or the Clerk knew the giving any Money.

(5) Error to reverſe a Judgment in Quare Impedit, where the King had recovered upon a ſimoniacal Agreement, which was, that a Friend of the Clerk ſhould give W. R. ſo much Money to procure him to be preſented, and that he was preſented ſecundum agreamentum prædict'; the Error aſſigned was, that neither the Patron or the Clerk knew any Thing of giving the Money: Sed per Curiam, he was Simoniace promotus, for being preſented ſecundum agreamentum prædict', is a good Averment of a ſimoniacal Promotion.

3 Lev. 337. Where the Incumbent pleaded, that he had no Notice of the corrupt Agreement between *R.* and the Grantee of the next Avoidance to preſent him.

(6.) In a Quare Impedit, the Plaintiff ſet forth, that he had granted the next Avoidance to B. that the Church became void;

and then he ſets forth the Statute made againſt Simony, and during the Avoidance a corrupt Agreement was made between one Richards and the Grantee of the next Avoidance, that he ſhould preſent one Hide, who was preſented accordingly, which by Vertue of the Statute was void, &c. the Defendant Hide pleads with a Proteſtation to the Agreement, and that he had no Notice thereof; and upon a Demurrer to this Plea it was adjudged againſt the Incumbent Hide, becauſe Notice in this Caſe is not material, by Reaſon of the Difficulty of proving it; 'tis the corrupt Agreement which makes the Simony, tho' the Incumbent might have no Notice of it.

(7.) Debt upon Bond, conditioned to reſign upon Requeſt; the Defendant pleads, that he did reſign according to the Condition of the ſaid Bond, upon which they were at Iſſue, and the Jury found for the Plaintiff; and upon a Writ of Error brought in B. R. it was aſſigned for Error, that this Bond was void, becauſe it was made upon a ſimoniacal Agreement: Sed per Curiam, the Judgment was affirmed. Raym. 175. 3 Mod. 297. Sid. 387. Debt upon Bond conditioned to reſign upon Requeſt, good.

SLANDER.

(1.) CASE, &c. for theſe Words, * *Nuttal*, who was *Solomon Smith*'s Clerk, is a Knave and a Rogue, and I will prove it, and he is in Newgate for Counterfeiting the King's Hand and Seal, and will be hanged for it, actionable. In capital Offences actionable. * Raym. 17.

(2.) Caſe for theſe Words, Thou haſt ſtole our Bees (innuendo, a Stock of Bees) and Thou art a Thief; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that Felony cannot be committed of Bees, becauſe they are Feræ Naturæ: Sed per Curiam, the ſubſequent Words, viz. Thou art a Thief, ſhew, that the Stealing was of ſuch Bees of which Felony may be committed, and ſo actionable. Raym. 33.

(3.) Caſe, &c. He is a Clipper and a Coiner, after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Words did not charge the Plaintiff with Clipping or Coining Money, for they may be applied to many other Things; but adjudged 1 Vent. 172.

judged actionable, for it must be intended, that he meant Clipping of Money, and in that Sense 'tis usually understood.

In capital Offences not actionable. 1 Vent. 213.

(4.) Case, &c. He pick'd my Pocket against my Will, he is a Pick-pocket, not actionable, because the Words do not imply, that he was guilty of Felony.

1 Vent. 325.

(5.) Case, He would have given *Dean* Money to rob *Golding*'s House, and he did rob the House; after a Verdict for the Plaintiff it was insisted in Arrest of Judgment, that the first Part of the Sentence imports only an Inclination to rob, and the subsequent Words are relative to the first, for the Word He must refer to the last Antecedent, which was Dean, so no Charge on the Plaintiff: Sed per Curiam, the Words may be thus construed, that the Plaintiff gave Dean Money to rob the House, and he refusing, the Plaintiff himself robbed the House.

2 Vent. 172.

(6.) Case, &c. for these Words, He broke my House like a Thief; upon Not guilty pleaded, the Plaintiff had a Verdict: Sed per Curiam, in Arrest of Judgment, the Words are not actionable.

Words of Tradesmen actionable. Raym. 62.

(7.) Case for these Words spoken of a Broker, and of his Profession, he is a cheating Knave, he hath cheated me with Brass-Money: Per Curiam, to call a Tradesman a Cheat generally, is not actionable, unless the Words are spoken of his Trade.

Raym. 207.

(8.) Case, &c. brought by a Merchant for these Words, there being a Communication of him, the Defendant said, I believe all is not well with Daniel Vivian, there are many Merchants who have lately failed, and I expect no otherwise of Daniel Vivian, actionable.

Raym. 169. 1 Lev. 250.

(9.) Case, &c. by a Mercer for these Words, Thou art a cheating Knave and a Rogue; after a Verdict for the Plaintiff, the Judgment was stayed, because there was no Colloquium laid of his Trade.

Raym. 184.

(10.) Case, &c. by a Merchant for these Words, Austin Drake is broke, he is a beggarly Fellow, and not worth a Groat, and not able to pay his Debts; after a Verdict for the Plaintiff it was moved, that the Words are not actionable, for he may be an honest Man, and not worth a Groat, and 'tis no Crime to be a beggarly Fellow, for it may be a Misfortune, and no Fault: But per Curiam, to say he is not able to pay his Debts, is actionable.

Raym. 231.

(11.) Case, in which the Plaintiff declared, that he is a Keeper of a Livery-Stable, and of Bell-Savage Inn, and that the

Defendant had other Stables there, and that W. R. coming thither with a Waggon, enquired of the Defendant which was Bell-Savage Inn, who replied, this is Bell-Savage Inn, deal not with Southam (the Plaintiff) for he is broke, and there is neither Entertainment for Man or Horse; after a Verdict for the Plaintiff and great Damages, the Judgment was affirmed.

(12.) Case, &c. in which the Plaintiff declared, that there being a Communication of his Trade, the Defendant said He is a cheating Knave, and keeps a false Book, with which he hath cheated the Country, actionable, for tho' cheating Knave is not actionable, tho' a Colloquium was laid of his Trade, yet 'tis actionable to say he keeps false Books, for Tradesmen's Books are often given in Evidence, therefore they must not be false. 1 Vent. 263.

(13.) Case, &c. by a Draper for these Words, you are a cheating Fellow, and keep a false Book; the Plaintiff had a Judgment, but it was set aside, because he had not alledged any Colloquium of his Trade, for to say a Man is a cheating Fellow, it doth not follow that he is so in his Trade, for he may cheat at Gaming, and the Words being general, may as well be applied to that as to his Trade; and to keep a false Book, doth not imply that he kept a false Debt-Book, for he might keep a Book which is false printed. Words spoke of Tradesmen not actionable. 2 Saund. 307.

(14.) Case, &c. for these Words spoken of a Distiller, wherein the Plaintiff declared, that he, discoursing with one Isles, asked him of whom he bought Aqua Vitæ, who replied of Mr. Godfrey (the Plaintiff) then the Defendant said, He is a Varlet, he hath suppressed his Brother's Will to cozen and deceive Men of their Legacies, I will make him cry Peccavi on his Knees, &c. not actionable, because those Words do not relate to his Trade. Palm. 21.

(15.) Case, &c. for these Words spoken of a Merchant, You are a Cheating Rogue, and a Runagate Rogue; after a Verdict for the Plaintiff, it was adjudged not actionable; for to say generally, that a Man is a Cheater, is not actionable, unless there is a Colloquium of his Trade or Profession, which was not done in this Case. Hardr. 8. 2 Lev. 214.

(16.) Case for these Words spoken of a Watch-maker, He is a Bungler, and knows not how to make a good Piece of Work; after a Verdict for the Plaintiff, adjudged not actionable, because the Words are indifferent, and have no Relation to his Trade; 'tis true, in this Case the Jury found that the Plaintiff was a Watch-maker; and if the Words had been, he knows not how to make a good Watch, it had been actionable. 1 Mod. 19.

(17.) Case,

2 Lev. 233. (17.) Caſe, &c. for ſaying, that ſhe is as much a Man as I am, ſhe is an Hermaphrodite, ſpoken of a Woman who taught Girls to dance, not actionable; for 'tis no Scandal to her Profeſſion to ſay, that ſhe is an Hermaprodite, becauſe Men uſually teach young Women to dance.

Words ſpoke of Men of Profeſſions actionable. 2 Vent. 28. 1 Saund. 231. (18.) Caſe, &c. in which the Plaintiff declared, that he was bred to the Law, and practiſed it, and that the Defendant wrote a Letter to A. C. his Client, that he (the Plaintiff) would give vexatious and ill Counſel, and ſtir up a Suit, and would milk her Purſe and fill his own large Pockets; actionable by 3 Judges, contra Vaughan Ch. Juſt.

2 Vent. 172. (19.) Caſe againſt an Attorney for theſe Words, He is a Cheating Knave, and not fit to be an Attorney; actionable, becauſe ſaying, he was not fit to be an Attorney, ſhews that the preceding Words, (viz.) Cheating Knave, muſt neceſſarily refer to his Profeſſion as an Attorney.

Raym. 196. (20.) Caſe by an Attorney, in which he laid a Colloquium of his Profeſſion, and of him, and that the Defendant ſaid in the Hearing of ſeveral People, Thou canſt not read a Declaration, by Reaſon whereof T. P. and W. R. who were formerly his Clients, deſerted him: Upon Not guilty pleaded the Plaintiff had a Verdict, and upon a Motion in Arreſt of Judgment, the Words were held actionable.

Words of Men of Profeſſions not actionable. Palm. 441. Poph. 177. Latch 20. (21.) Caſe, &c. for theſe Words ſpoken of an Attorney of B. R. You are a Knave on Record, and a Forgery Knave; not actionable, as reported by Palmer.

1 Lev. 250. Raym. 182. (22.) Caſe, &c. In which the Plaintiff declared, that he is a Mercer, and that the Defendant ſpoke theſe Words, Thou art a Cheating Knave, and a Rogue; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that here was no Colloquium laid of his Trade, and for this Reaſon the Judgment was ſet aſide. In antient Times it was the conſtant Courſe to lay a * Colloquium in Declarations for Words, and it was a Doubt whether it was good without it, till the Caſe of Smith and Ward in 2 Cro. but ſince that Caſe it hath been held ſufficient to alledge, that the Words were ſpoken de querente and de arte ſua, which Allegation ſhall ſupply the Colloquium.

* Raym. 86.

STATUTE.

(1.) Information for importing twenty Pottacos of Tobacco in a Veſſel not belonging to the People of this Nation contra formam Statuti; after a Verdict for the Informer, the Judgment was ſet aſide, becauſe by the Statute the Goods muſt belong to the People of this Nation, and 'tis not averred that the Tobacco thus imported did belong to the People of this Nation, for 'tis that which makes the Forfeiture, and 'tis none if imported in a Foreign Veſſel, and by Foreigners; and the Concluſion contra formam Statuti will not help in this Caſe, becauſe the Omiſſion is in the moſt material Part of the Statute which creates the Offence, and which ought to be ſtrictly purſued.

Hardr. 20. Where there is an Omiſſion in the moſt material Part of a Statute, the Concluſion *contra formam Statuti*, will not help. *Poſtea* 11. S. P.

(2.) The Defendant was indicted for ſelling Ale in black Pots not marked, and this Indictment did not conclude contra formam Statuti. Sed per Curiam, 'tis good without ſuch Concluſion, becauſe the Common Law appoints, that all Meaſures ſhould be juſt; therefore to ſell leſs than Meaſure, is an Offence at Common Law, and this Circumſtance of Marking the Meaſure is only added by the Statute.

1 Vent. 13. Sid. 409. Where the Omiſſion of *contra formam Statuti* will not hurt.

(3.) Information for a Riot, and concluded, contra formam Statuti 13 H. 4. after a Verdict for the Informer, it was moved in Arreſt of Judgment, that the Information was ill, becauſe it concluded contra formam Statuti, whereas the Statute doth not make the Offence, but appoints Juſtices of the Peace, upon Complaint that there is a Riot, to view and record the ſame, and in what Manner to puniſh the Rioters. Hale Ch. Juſt. of Opinion, that this being an Offence at Common Law, and mentioned in this Statute, therefore the Information was well concluded contra formam Statuti; but the other Judges were againſt him.

1 Vent. 43. Where the Concluſion *contra formam Statuti*, will hurt.

(4.) Adjudged, that where an Offence is created by a Statute, which was not an Offence at Common Law, and if that Statute gives an Action to the Proſecutor, in ſuch Caſe he muſt ſhew in his Declaration, that the Defendant is within all the Qualifications and Deſcriptions of that Statute, otherwiſe the Action will not lie; but where the Penalty is given to the King, 'tis ſufficient to ſay contra formam Statuti.

Sid. 303. Where an Offence is made by a Statute, and a Puniſhment or Action given to the Proſecutor, he muſt bring himſelf within the Qualifications of the Act.

2 Lev. 233. (17.) Caſe, &c. for ſaying, that ſhe is as much a Man as I am, ſhe is an Hermaphrodite, ſpoken of a Woman who taught Girls to dance, not actionable; for 'tis no Scandal to her Profeſſion to ſay, that ſhe is an Hermaprodite, becauſe Men uſually teach young Women to dance.

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(1.) Information for importing twenty Pottacos of Tobacco in a Veſſel not belonging to the People of this Nation contra formam Statuti; after a Verdict for the Informer, the Judgment was ſet aſide, becauſe by the Statute the Goods muſt belong to the People of this Nation, and 'tis not averred that the Tobacco thus imported did belong to the People of this Nation, for 'tis that which makes the Forfeiture, and 'tis none if imported in a Foreign Veſſel, and by Foreigners; and the Concluſion contra formam Statuti will not help in this Caſe, becauſe the Omiſſion is in the moſt material Part of the Statute which creates the Offence, and which ought to be ſtrictly purſued.

Hardr. 20. Where there is an Omiſſion in the moſt material Part of a Statute, the Concluſion *contra formam Statuti*, will not help. *Poſtea* 11. S. P.

(2.) The Defendant was indicted for ſelling Ale in black Pots not marked, and this Indictment did not conclude contra formam Statuti. Sed per Curiam, 'tis good without ſuch Concluſion, becauſe the Common Law appoints, that all Meaſures ſhould be juſt; therefore to ſell leſs than Meaſure, is an Offence at Common Law, and this Circumſtance of Marking the Meaſure is only added by the Statute.

1 Vent. 13. Sid. 409. Where the Omiſſion of *contra formam Statuti* will not hurt.

(3.) Information for a Riot, and concluded, contra formam Statuti 13 H. 4. after a Verdict for the Informer, it was moved in Arreſt of Judgment, that the Information was ill, becauſe it concluded contra formam Statuti, whereas the Statute doth not make the Offence, but appoints Juſtices of the Peace, upon Complaint that there is a Riot, to view and record the ſame, and in what Manner to puniſh the Rioters. Hale Ch. Juſt. of Opinion, that this being an Offence at Common Law, and mentioned in this Statute, therefore the Information was well concluded contra formam Statuti; but the other Judges were againſt him.

1 Vent. 43. Where the Concluſion *contra formam Statuti*, will hurt.

(4.) Adjudged, that where an Offence is created by a Statute, which was not an Offence at Common Law, and if that Statute gives an Action to the Proſecutor, in ſuch Caſe he muſt ſhew in his Declaration, that the Defendant is within all the Qualifications and Deſcriptions of that Statute, otherwiſe the Action will not lie; but where the Penalty is given to the King, 'tis ſufficient to ſay contra formam Statuti.

Sid. 303. Where an Offence is made by a Statute, and a Puniſhment or Action given to the Proſecutor, he muſt bring himſelf within the Qualifications of the Act.

Platt *verſus* Hill. Mich. 10 Will. III.

Where the Defendant will take Advantage of a Miſrecital, he muſt not demur, but plead *Nul tiel Record.* See *Poſtea* 8. *contra.*

(5.) PER Holt Ch. Juſt. Where the Plaintiff miſrecites a Private Act of Parliament, and the Defendant demurs to the Declaration, Judgment ſhall be given for the Plaintiff, for it ſhall be taken to be as 'tis pleaded, becauſe by the Demurrer 'tis confeſſed to be ſo; therefore, if the Defendant will take Advantage of a Miſrecital of an Act of Parliament, he muſt plead Nul tiel Record, or alledge, that 'tis farther enacted ſo and ſo, &c.

Flower *verſus* Parker. Mich. 5 Annæ.

Juſtices, &c. have no Authority, if the Defendant was not in Cuſtody ſuch a Day.

(6.) THE Defendant was taken by Proceſs of the Court of B. R. and now prayed the Benefit of being diſcharged upon Common Bail, according to the Statute for Diſcharging poor Priſoners, ſhewing the Certificate of the Gaoler, and the Adjudication of the Juſtices. Et per Curiam, the Juſtices have no Authority, unleſs the Defendant was actually in Cuſtody on ſuch a Day; for a bare Being within the Rules will not be ſufficient, and this Court will examine the Truth of it, notwithſtanding this Certificate and Adjudication.

Winter *verſus* Price. Mich. 5 Annæ B. R.

Juſtices cannot diſcharge a Priſoner, if he owes more than 100 *l.* to one Man.

(7.) THE Defendant Price being indebted to Winter in a Bond of 180 l. conditioned to pay 90 l. and Intereſt on ſuch a Day, was arreſted, and diſcharged by the Juſtices, upon the Statute of Poor Priſoners, upon Common Bail. Sed per Curiam, There being 20 l. due for Intereſt at the Time that Statute was made, by Conſequence he owed at that Time more than 100 l. and therefore the Juſtices could not lawfully diſcharge him; ſo their Order was made void.

* *Antea* 5. Where a Man miſrecites a *general Statute*, the other Side muſt demur, but not if he miſrecites a private Statute.

(8.) In Platt and Hill's Caſe before mentioned, it was held, per Holt Ch. Juſt. That if a Man miſrecites a General Statute, the other Side cannot plead Nul tiel Record, but muſt demur; and then if the Miſrecital was of Subſtance, and the Party upon reciting it concludes Vigore Statuti pred', or contra formam Statuti pred', 'tis naught; but if he conclude contra formam Statut' in hujuſmodi caſu edit', or the like, 'tis good.

(9.) 'Tis a ſafe Way in Pleading to ſet out, that a Parliament was held generally in ſuch a Year of the King, without deſcending to Particulars, as to the Day and Month; as for Inſtance, Actio non quia dicit quod in Statuto in Parliamento Domini Willielmi nuper Regis Angliæ tertii apud Weſtm' Anno Regni ſui nono tent' edit' inter alia Ordinatum fuit authoritate ejuſdem quod, &c. 1 Saund. 5. The Form of Pleading a Statute.

Mills *verſus* Wilkins. Mich. 2 Annæ.

(10.) IN Treſpaſs for taking ſeveral Skins; the Defendant juſtified under the Statute 1 Jac. 1. cap. 12. intituled an Act, &c. but miſtook one Word in the Title; and upon a Demurrer to this Plea it was urged, that the Title is no Part of the Act, and that by the Opinion of *Hale Ch. Baron, an Act of Parliament may be good without a Title: Sed per Holt Ch. Juſt. tho' the Title is no Part of the Act, no more than the Preamble, or the Title of a Book is Part of a Book; yet where the Juſtification is tied to the Act deſcribed, and if there is no ſuch Act the Juſtification muſt be ill; 'tis true, in Pleading 'tis not neceſſary to ſet forth the Title of the Act, for 'tis ſufficient generally to ſay, quod inactitatum fuit; but if a Title is ſet forth, 'tis better to do it in Latin than in Engliſh, Judgment was given for the Plaintiff. 2 Salk. 609. Where the Miſtake was in the Title of the Act recited. *Hardr. 324.

(11.) Information on the Statute 35 H. 8. cap. 17. for grubbing up Wood contra formam Statuti, &c. after a Verdict for the Plaintiff it was objected in Arreſt of Judgment, that this Information was not good, becauſe it did not ſet forth, that the Wood was growing at the Time of the Act made; as upon the Statute 5 Eliz. for exerciſing a Trade, not being an Apprentice to it for ſeven Years; it muſt be alledged, that it was a Trade uſed at the Time of that Act made, and for this Reaſon the Judgment was ſet aſide; 'tis true, this Information concludes contra formam Statuti, but that will not help, becauſe thoſe Words are no Part of the Caſe, they are only a Concluſion upon the Premiſſes inſufficiently ſet forth. Hard. 105. Where the Concluſion *contra formam Statuti* will not help. *Antea* 1. S. P.

Suit of Court and Services.

Of Suit Real and Suit Service.

(1.) There are two Sorts of Suits, (viz.) Suit Real and Suit Service; the first is by Common Law and of Common Right, for 'tis that Attendance which Men owe to Tourns and to County Courts, and the Law obliges them to this Service, in respect of their Commorancy, that there may be no Want of Jurors to do the Business of those Courts; therefore he who makes Default and doth not appear there, is to be amerced; the Nobility are excused by the Statute of Marlbridge, cap. 10. now by the Statute of Merton, cap. 10. a Man may do this Suit by Attorney; but if the Sheriff's Tourn is held out of the Hundred where the Party lives, then, in such Case he is excused by the Statute of Marlbridge aforesaid.

Suit Service is due by Reservation.

(2.) Suit Service is in respect of the Tenure, and 'tis due by Reservation, therefore, for this as well as for all other Services by which Lands are held, the Lord may distrain, if there is a Default in the Tenant; and as Suit Real is due to such Courts which are of publick Institution, (viz.) to the County Courts and Tourns, so this Suit Service is due to the Courts of private Persons, as to Courts-Baron of particular Lords of Manors; and tho' the Suitors are Judges, yet they may do their Services by Attorney.

2 Lutw. 1366.

(3.) In Trespass, the Defendant pleads, that his Father being seised of certain Lands, demised them by Indenture to A. habendum to him and to his Executors and Assigns for ninety-nine Years, if the said A. and B. should so long live; reddendum, after the Death of the said A. and B. his or their best Beast, or 40 s. in Lieu thereof: Proviso, that no Heriot shall be paid upon the Death of B. living A. then A. died, and afterwards B. died, whereupon the Plaintiff having the Reversion by Descent, distrained a Gelding; but in the Pleading it did not appear, that the Distress was taken on the Premisses: Et per Curiam, this is a Heriot Service, being reserved upon a Lease, and in that Case, there being a Reversion, this is a Service incident to it, and therefore must be reserved payable during the Term; but where a Tenant in Fee holds of his Lord by Heriot Service, such Service is incident to the Tenure, which is antient, and must be supposed to be before the Statute Quia emptores, &c. and these are seisable by the Lord, either on, or out of the Lands;

but this being a Heriot Service by Reservation, and not due till post mortem. A. there can be no Reversion when it became due.

SUPERSEDEAS.

(1.) Where a Wit of Error is returnable in Parliament Teste after the Prorogation, and a whole Term intervene between the Teste and Return, 'tis no Supersedeas; but 'tis otherwise if a less Time intervene, or if the Writ of Error be returned before the Prorogation.

1 Vent. 266. Where a Writ of Error in Parliament is no *Supersedeas*.

(2.) Writ of Error upon a Judgment in B R. taken out, and Teste 1 Novemb. returnable 1 November prox', and a Mittimus endorsed on the Roll in B. R. it was held, that the Record still remained in B. R. to all Purposes, and that Execution might be taken out, for the Writ of Error was no Supersedeas.

Ibidem.

(3.) Writ of Error in the Exchequer-Chamber, upon a Judgment in B. R. and Error in Fact assigned, which not being assignable there, that Court affirmed the Judgment of B. R. and the Record of Affirmation being transmitted into B. R. the Plaintiff brought another Writ of Error there coram vobis resident, and moved, that upon putting in Bail it might be a Supersedeas to the Execution: Sed per Curiam, it was not allowed, because the Judgment being affirmed in the Exchequer-Chamber, transit in rem judicatam.

1 Vent. 107. 2 Lev. 38. Writ of Error *coram vobis resident* is no *Supersedeas*.

(4.) Judgment against W. R. in B. R. and a Writ of Error brought in the Exchequer-Chamber; afterwards the Plaintiff brought an Action of Debt on that Judgment, and the Defendant pleaded Nul tiel Record; and upon a Demurrer this was adjudged an ill Plea, because the Writ of Error is no Supersedeas to the Action of Debt on the Judgment, but only to the Execution upon that Judgment; besides, the Record is not removed by the Writ of Error, but only the Transcript.

Sid. 236. Raym. 100. 1 Lev. 153. 1 Vent. 34. Writ of Error in the Exchequer-Chamber is no *Supersedeas* to an Action of Debt on a Judgment in *B. R.*

(5.) Adjudged, that where a Writ of Error is not shewn to the other Party, or allowed by the Clerk, by his endorsing Recepi upon it within four Days (which is allowed as a convenient Time for putting in Bail, according to the Statute) 'tis no Supersedeas;

1 Vent. 255. Where a Writ of Error is no *Supersedeas*.

perſedeas; likewiſe, if before the Writ of Error allowed, the Sheriff returns Fieri Feci, or Non inveni emptores, that in ſuch Caſe the Execution ſhall not be ſet aſide.

Superſtitious Uſe.

(1.) ALL Superſtitious Uſes are void, and given to the King by the Statute of * Ed. 6. which extends only to ſuch Uſes as were made before that Time, ſo that all Superſtitious Uſes ſince that Statute was made, tho' they are void, yet they are not forfeited to the King.

* 1 Ed. 6. cap. 14.

1 Rep. Porter's *Caſe*.
43 Eliz. cap. 4.
23 H. 8. cap. 10.

(2.) Whatever Uſe is deviſed or given to any Perſon or Company, and which is not a charitable or good Uſe in the Eye of the Common Law, or within the Statute 43 Eliz. ſeems to be a void Uſe, and of no Effect within the Statute 23 H. 8.

The King and Queen verſus Portington & al'. Mich. 4 Will. III. B. R.

1. C. 1. Salk. 162. Mſs. Rep. pen. me 206. 12. Mod. 31.

1 Salk. 162. Where an Averment will not be allowed to defeat a Will.

(3.) IN Ejectment by the Heir at Law againſt the Deviſee, the Caſe upon Evidence was, that the Defendants were Roman Catholicks, and that one of them did recommend ſuch a Prieſt to be Confeſſor to the Teſtatrix, who perſuaded her ſhe could not be ſaved, unleſs ſhe deviſed her Eſtate to God and his Saints, and that the Defendant was an Abbeſs in France, and joining with the Confeſſor in the ſame deluſive Perſuaſions, prevailed with the Teſtatrix to deviſe her Eſtate to her, and this was urged to be Evidence of a Superſtitious Uſe; but the Court was of Opinion, that this being an abſolute Deviſe, and no Truſt declared or appearing upon the Face of the Will it ſelf, no ſuch Averment could be made or admitted, for if the Law will not allow an Averment to ſupply a Will, a fortiori, there can be none to defeat it: Et per Holt Ch. Juſt. The Stat. 23 H. 8. makes ſuch Uſes void, but doth not give them to the King, and the Statute 1 Ed. 6. gives them to the King, but doth not extend to future Uſes made after that Statute; and that it might be convenient for the Heir at Law to ſeek his Remedy in Parliament, according to the Caſe in Moor 784. quod vide.

(4.) Feoffment to the Uſe of his Laſt Will, then the Teſtator deviſed his Lands to the Dean of Newark for an obiit, and the Reſidue to pay a Chantry Prieſt 7 l. per Annum during the Life of his Wife, and of his Siſter Edith, to chant for his Soul, &c. and after the Death of his Wife and Siſter, then to perform Divine Service for 99 Years, and afterwards to be ſold, and the Money to be diſtributed to charitable Uſes for the aforeſaid Souls. The Feoffees made a Feoffment accordingly for 99 Years, rendering 7 l. per Annum to the Chantry Prieſt; then came the Statute 1 Ed. 6. concerning Chantries, and the Queſtion was, whether the Fee-ſimple or the Leaſe only was forfeited to the King? Et per Curiam, The Fee-ſimple is forfeited; for by the firſt Feoffment and the Will all was limited to Superſtitious Uſes.

2 Sid 13, 34, 46. Where a Limitation is to a Superſtitious Uſe.

TAIL.

Of Eſtates-tail, and of Leaſes, &c. made by Tenants in Tail.

Simonds *verſus* Cudmore. Hill. 1 Will. III. Rot. 743.

(1.) THIS Caſe is reported in * 1 Salk. but more clearly here, (viz.) A. was Tenant for ten Years in Poſſeſſion; the Remainder was to B. in Tail, who had likewiſe the Reverſion in Fee expectant, upon the Determination of the Leaſe for ten Years, and being ſeiſed of both theſe Eſtates, he made a Leaſe for Years to commence at a Day to come; but before that Day came he died; then the Iſſue in Tail levied a Fine, and declared the Uſes thereof to himſelf and his Heirs; the Leaſe for ten Years expired, and then the Future Leſſee entred, and was in Poſſeſſion by Vertue of the Leaſe made to him by the Tenant in Tail

* 1 Salk. 338. Where a Leaſe made by the Tenant in Tail, ſhall bind the Iſſue.

Tail, upon whom the Iſſue in Tail entered, and the Queſtion was, whether he was bound by this Future Leaſe.

In arguing this Caſe it was held, that where Tenant in Tail makes a Leaſe to commence in præſenti, 'tis voidable by his Death; but if he makes it to commence in futuro (as in this Caſe he had done) (viz.) If it be to commence after his Death, 'tis void, becauſe 'tis not derived out of his own Eſtate and Poſſeſſion, but out of the Eſtate of the Iſſue in Tail, which is paramount per formam doni; ſo if Tenant in Tail makes a Leaſe to commence at a Day to come, and dies before the Day come, the Leaſe is void, and the Leſſee is a Treſpaſſer if he enter, becauſe the Leſſee had no Eſtate or Intereſt in the Land, but only an Intereſſe Termini till actual Entry, and the Iſſue in Tail had a Title paramount and precedent to that of the Leſſee, which cannot be avoided. But per Curiam, in the Principal Caſe the Leaſe is not void but voidable by the Iſſue in Tail, and that only in Reſpect of the Eſtate-tail; and therefore ſince this Leaſe iſſued out of all the Intereſt and Eſtates which the Leſſor had, (viz.) as well out of the Reverſion in Fee, as the Eſtate-tail, and ſince the Eſtate-tail is now extinguiſhed by this Fine, which hath now turned all into an entire Fee-ſimple, it hath thereby made the Eſtate unavoidably ſubject to this Leaſe.

Lord Oſſulſton's *Caſe*. Mich. 7 Annæ.

Devise

2. Deviſe of a Remainder to his Right Heirs Male muſt be intended Right Heirs Males *of his Body*.

(2) FOrd being ſeiſed in Fee, and having Iſſue three Sons and a Daughter, and having likewiſe one Brother, deviſed his Lands to his eldeſt Son in Tail Male, and ſo the Second and Third Son, Remainder to his own Right Heirs Male for ever; the three Sons died without Iſſue, and the Queſtion was, whether the Daughter, as Heir General, or the Brother of the Teſtator, as Heir Male, ſhould have the Lands. Et per Curiam, none ſhall take by thoſe Words Heirs Males, but he who is Heir Male of the Body of the Teſtator, for no collateral Heir Male ſhall take by ſuch a Limitation by way of Remainder; for at Common Law, if Land was given by a common Conveyance to one and his Heirs Males, there the Word Males ſhall be rejected, for there was no ſuch Thing as an Heir Male, without ſaying of whoſe Body; and if by Letters Patents Lands were limited to W. R. and his Heirs Male, 'tis void, tho' 'tis otherwiſe in a Will; and the Reaſon is, becauſe in a Will the Law ſupplies thoſe Words, of his Body, and that makes it a Deviſe to him and the Heirs Males of his Body, for Heirs or Heir Male cannot be a Name of Purchaſe, but Heirs Males of his Body may: Therefore, if there is no ſuch Thing in Propriety of Speech as

an Heir Male, without saying of whose Body, for that Reason Heir Male of his Body, or Heirs Males of it self, where the Law will supply these Words, of his Body, as it will in a Devise, may be a good Name of Purchase; but yet the Party who would take by such a Limitation must be such a Person as may be an Heir by the Common Law, and would take by that Name.

See *Counden* v. *Clerke*, and *Pibus* v. *Mitford*.

Lee *versus* Brace. Mich. 8 Will. III. B. R.

(3.) A Feoffment was made to the Use of the Feoffor for Life, Remainder to W. R. his Son and his Heirs, and for Want of Issue of him, then to the Right Heirs of the Feoffor: Mr. Northey objected, that tho' this would have been an Estate-tail in W. R. by a Will, yet the Authorities which prove it to be so, do likewise prove, that it would be otherwise in a Deed, as in this Case. Sed per Holt Ch. Just. non allocatur, for this is but one entire Sentence of Limitation, the Intent whereof is very plain, and the Rule of Law is only, that an Estate of Inheritance cannot pass without Words of Inheritance; but there is no Rule in Law, that Words of Inheritance may not be qualified or abridged by subsequent Words; therefore in this Case W. R. hath only an Estate-tail, tho' by Deed, it being in one Sentence; for tho' the first Words of that Sentence, (viz.) to his Son and his Heirs, make a Fee-simple, yet the subsequent Words, (viz.) and for Want of Issue of him, make an Estate-tail, by qualifying and abridging the first Words, and in creating Entails, voluntas donatoris observanda est.

Feoffment to the Use of his Son and *his Heirs*, and *for Want of Issue* of him, Remainder over is an Estate-tail.

(4.) In a Special Verdict in Ejectment, the Case was; the Father being seised in Fee, had Issue Robert by the first Venter, and Ralph and Jane by the second Venter, and he covenanted to stand seised to the Use of himself for Life, Remainder to Trustees to several Purposes, Remainder to Jane for Life, Remainder to Ralph, and the Heirs Males of his Body, and of his Lands in W. (being the Lands now in Question) to the Use of his Heirs Males begotten on the Body of his second Wife; the Father died, and the Question was, whether by this Limitation any Use did arise to Ralph, who was his Heir Male by the second Wife? and adjudged that it did, because his Father had an Estate for Life in these Lands in W. not by express Limitation, but by Operation of Law, which being united to the Estate limited to the Heirs Males of his Body, makes an Estate-tail; now this being in a Covenant to stand seised, and no Transmutation of Possession, (as it was in Gresswold's Case) so much of the old Use which was not disposed by the Covenantor, still remains in him, for there is nothing to take it out of him, (and so is Counden and Clerk's Case,

2 Lev. 75. Raym. 228, 159, 273. 2 Mod. 207. 1 Mod. 121, 159. Sid. 98. Where an Estate for Life shall be raised by Implication, and united to a Limitation of the Lands to the Use of his Heirs Males begotten of his Body, so as to make an Estate-tail executed in himself.

and Bingham's Caſe) ſo that the old Uſe being ſtill in the Father, who was the Covenantor, this Eſtate for Life ſhall be raiſed in him by Implication of Law, to preſerve and ſupport this Limitation, (viz.) To the Heirs Males of his Body, ſo that this is an Eſtate-tail executed in him, and by Conſequence after his Death it ſhall be to Ralph, his Son, as a contingent Remainder.

Raym. 127. Where an Eſtate-tail is executed, and where the Remainder is not contingent.

(5.) By a Marriage Settlement and Fine levied, &c. to the Uſe of Huſband and Wife, for their joint lives, Remainder to the Heirs of the Body of the Wife by the Huſband to be begotten, Remainder, (the Wife ſurviving the Huſband) to her for Life, Remainder to the Right Heirs of the Huſband; per Curiam, this is an Eſtate-tail executed in the Wife, it cannot be a contingent Remainder, becauſe that never is but in Caſes where the particular Eſtate may determine before the Contingency happens.

TALES.

Cook's *Trial. fol.* 12, 13, 14, 15.

Where the Jury is ſummoned to try a Particular Iſſue, there may be a *Tales*, where not.

(1.) AT the Seſſions of Gaol-Delivery for the Trial of Cook for High Treaſon, the Court could not have a full Jury by Reaſon of Defaulters, and the many challenged by the Priſoner, whereupon the Court adjourned to another Day, and ordered another Panel to be then ready; it was objected, that there ought to be a Tales, and an Habeas Corpora, to compleat the Number of nine Jurors, who were already ſworn, for otherwiſe this Record would be left imperfect. Et per Curiam, Wherever the Jury is ſummoned by a Venire facias to try a particular Iſſue, there may be a Tales, becauſe there is a Writ upon which it may be grounded; but where there is no Venire facias 'tis otherwiſe; for there can be no Tales but with an Habeas Corpora to bring in the firſt Jurors: Therefore in the Caſe of Oyer and Terminer, tho' perhaps there may be ſuch a Courſe, yet in Commiſſions of Gaol-Delivery it cannot be; and 'tis very plain that 'tis not neceſſary; for in ſuch Caſes the Courſe is for the Juſtices

before they come to Court, to send a written Precept to the Sheriff generally, to return Jurors against their Coming, in order to deliver the Gaol; and out of those Panels the Jury is called, and without any Writ or Precept in Writing, and the Entry is no more than thus, (viz.) that W. R. the Prisoner, pleaded Not guilty, Ideo immediate veniat inde Jurata, and this is always before Issue joined, and therefore 'tis never to try a particular Issue; and in this respect the Proceedings of Oyer and Terminer differ, that they do not send a general Precept to the Sheriff before Issue joined, but a particular Precept after Issue joined, to summon a Jury to try a particular Issue, so that this is a Precept in Nature of a Venire facias, upon which Accompt, perhaps a Tales may be grantable: But here it is otherwise, because there is neither a particular Venire facias, or Precept in the Nature of one.

1 Lev. 223. A Tales is never awarded on an Indictment, unless there is a Warrant from the Attorney General.

(2.) A Tales is never awarded upon an Indictment, unless by Warrant from the Attorney-General, but 'tis awarded upon an Information qui tam, &c. because of the Interest which the Prosecutor hath in such Prosecutions.

TAXES.

Grand Customs.

(1.) THE grand Custom of a Mark and Demi-mark on Woolfels and Leather, and also Prisage, (i. e) one Tun of Wine before the Mast, and one Tun behind the Mast of every tenth Tun, were due to the King by Common Law, and these are implied by the Words * rectæ & antiquæ consuetudines in Magna Charta, but Petty Customs, or parvæ Custumæ, begun Anno * 31 Ed. 1. and were made perpetual by 27 Ed. 3. cap. 26.

* Cap. 30.

Tonnage and Poundage.

(2.) Tonnage and Poundage is by an Act of Parliament, and was never granted for any longer Time than for one or two Years, till the 31 Hen. 6. when it was granted to that King for Life; and not only for the ordinary Defence of the Sea, but that the King might have a Stock of Money always ready for that Purpose, &c.

Brewſter *verſus* Kidgell. Hill. 9 Will. III. B. R.

1 Salk. 198. Of Taxes, Subſidies, and Aſſeſſments.

(3.) THIS Caſe is reported in 1 Salk. but more clearly, and yet more at large, as followeth, (viz.) It was a feigned Action upon a Wager, in which the Queſtion was, whether the Plaintiff might deduct 4 s. in the Pound, being ſo much charged on the Lands by the Statute 4 & 5 Will. 3. and Power given to deduct it, with a Proviſo not to alter any Covenants or Agreements between the Parties.

The Jury found, that R. Langford being ſeiſed in Fee of theſe Lands, did, in the Year 1649, grant a Rent-charge of 40 l. per Annum, iſſuing out of the ſame to the Grantee and her Heirs, and on the Back of this Deed there was this Memorandum indorſed, (viz.) That it is the true Intent and Meaning of theſe Preſents, that the Grantee and her Heirs ſhould be paid the ſaid Rent-charge, without Deduction for any Taxes for the Rent or Lands therewith charged; and afterwards by another Deed he covenanted to pay it, free from all Taxes: Et per Holt Ch. Juſt.

The Word Taxes generally ſpoken, with Reference to any Freehold, or where the Subject Matter will bear ſuch Reference, ſhall be intended * Parliamentary, and this propter excellentiam; but there are other Taxes not Parliamentary, ſuch as are for repairing Churches, Taxes impoſed by Commiſſioners of Sewers; and generally, any † Impoſition which takes away Part of a Man's Goods or Rent, may properly be called a Tax.

* 34 H. 8. Quinzeſme 9.

† 2 Inſt. 532.

The antient Way of Taxing was by Tenths and Fifteenths, then by Subſidies, afterwards by Royal Aids, and at laſt by a Pound Rate, the former were all upon the Perſon and the perſonal Eſtate, and were much the ſame, but the laſt was upon Lands and Rents.

Anno 18 Ed. 3. a Valuation was made of all the Towns in England, and returned into the Exchequer, and this became the ſtanding Rule for Taxing every Town, (viz.) when a Tax was given, the Officers of the Exchequer preſently knew to how much it amounted for every Town, and the Inhabitants taxed the Landholders and Occupiers of Lands, and they were charged and paid their Proportion, tho' they held at a Rack-Rent.

2 Inſt. 76, 77.

11 H. 4. 35, 36. Br. Quinzeſme 9.

* Cap. 50.

The firſt Subſidy was granted Anno * 32 H. 8. and this was a Tax upon the Perſon, both for his Lands and Goods, and payable by him where he lived, and this continued till the 15th Year of Car. 1.

About two Years afterwards, (viz.) Anno 17 Car. 1. the firſt Aſſeſſment was made upon Lands and Rent, according to a Pound-Rate; and by this and other Statutes there was a Clauſe for the Tenant to deduct the Taxes, and ſo it was in the Years

1642, 1644, 1659, and when by the Agreement of the Parties the Taxes were not to be deducted, there was usually a Clause in all Deeds for that Purpose, as it was in this Deed, and at that Time that there should be no Deduction for Taxes; so that if this Covenant or Memorandum had been made in the Year 1640, it would not have extended to those Taxes, because there were no such then in Being or known in the Law, and therefore could not have been foreseen by the Grantee, without a prophetick Spirit; but being frequent and in Use when this Deed was made, he must intend that the Rent-charge should be free from these Taxes, otherwise he intended nothing by this Memorandum and the other Deed.

(4.) The Defendants were indicted for a Misdemeanor, for that being Assessors and Collectors of the publick Taxes in such a Parish, they assessed some too high, and omitted others, and yet they levied the Money on those who were omitted, and converted it to their own Use, for that their Names were not set down in their Books; and being convicted, and coming now to receive Judgment, it was moved, that no corporal Punishment might be inflicted on them, because the Crime was not of an infamous Nature: Sed per Curiam, they were adjudged to the Pillory in the County where the Crime was committed, and that the Marshal should carry them down and a Writ should go to the Sheriff to assist him in the Execution of this Sentence.

Mod. Cases 306. Assessors of Taxes indicted for a Misdemeanor.

TENDER.

(1.) Where a Tender and Refusal is pleaded, 'tis the Refusal which is traversable, and not the Tender; for 'tis that makes it a Payment in Law and not the Tender; and wherever the Demand is certain, or a certain Sum claimed in the Declaration, there a Tender and Refusal is a good Plea, and a Tender is not well pleaded without a Refusal.

Sid. 13. Refusal, where traversable. Sid. 364. 2 Vent. 109.

(2.) Debt upon Bond conditioned to pay 12l. on the 15th of Aug. and on the 15th of Feb. by equal Portions; the Defendant pleaded, that on the 15th of August there was 6l. due, which on that very Day at B. obtulit solvere, and was ever after ready

2 Vent. 107. Where a Tender is pleaded without a Refusal to accept, 'tis not good, unless a certain Place of Payment is appointed.

ready to pay; and afterwards, (viz.) on the 15th Day of December, he did pay it to the Plaintiff, who accepted it; and upon a Demurrer to this Plea it was adjudged ill, because the Defendant pleaded a Tender without a Refusal to accept, and his accepting it afterwards will not help; 'tis true, if there had been a certain Place of Payment mentioned in the Condition of this Bond, and the Defendant had shewed that the Plaintiff was not there ready to receive it, this might be good, but here was no certain Place appointed.

2 Lev. 209. Where the Time and Place is certain, *semper paratus* is not a good Plea, without alledging *obtulit se solvere.*

(3.) In Debt for Rent, the Defendant pleaded in Bar, that he paratus fuit at the Day and Place, &c. to pay it, and that ever since he hath been ready, & profert hic in Curia the Rent, and so petit judicium de damnis; and upon Demurrer to this Plea it was objected, that it was ill, because the Time and Place of Payment being certain, 'tis not good to say semper paratus fuit, without alledging, that obtulit se solvere, and adjudged accordingly.

Raym. 418. Where *semper paratus* is a good Plea without a Tender.

(4.) Debt for Rent, the Defendant pleaded, that he was at the House on the Day, &c. for an Hour before Sun-set, and stayed there on the same Day till Sun-set, ready to pay the Rent, and that no Body was there to receive it; and that since that Day he always was, and yet is ready to pay the same, & denarios illos idem defendens hic in Curia profert parat' fore solvend' eidem (the Plaintiff) si illos de eodem (the Defendant) accipere velit & hoc, &c. And upon a Demurrer to this Plea it was objected, that the Defendant did not plead a Tender at the Day, but only that he was then ready to pay the Rent: Sed per Curiam, the Plea is good without a Tender, but it had not been so in an Action of Debt on a Bond, for there a Tender must be set forth to save the Breach of the Condition.

Lancashire *versus* Killingworth. Trin. 13 Will. III. B. R.

2 Salk. 623. Where the Place and Time are certain, it must be set forth in the Pleading at what Time he came, and how long he stayed.

(5.) There is a short Note of this Case reported in 2 Salk. by the Name of Lancashire versus Killegrew, but the Case was thus: ff. In Covenant, the Plaintiff declared, that the Defendant's Testator covenanted with the Plaintiff, upon two Days Notice, at any Time within one Year, to accept 1000 l. joint Stock of the Hudson's Bay Company, at the Hudson's Bay House; and that upon the Transfer thereof he would pay the Plaintiff 2000 l. the Plaintiff avers, that on the second Day of November, &c. he gave Notice to the Defendant to come on the

fourth Day of November, (which was within the Year) to the Hudſon's-Bay Houſe, and then and there to accept the Transfer of 1000 l. Stock, and that the Plaintiff was ready there, and offered to transfer it, but the Defendant did not accept it, neither had he paid the 2000 l. Upon a Demurrer to this Declaration, Holt Ch. Juſt. held, that if the Tender had been well ſet forth, the Plaintiff would have a good Title to the 2000 l. for if he hath done all which he can do, in order to accompliſh what he had agreed to do, 'tis as effectual and ſufficient as if he had actually transferred the Stock. But here the Tender is not well pleaded; for where 'tis pleaded at the Place appointed, as in this Caſe it was at the Hudſon's-Bay Houſe, and no one there to accept the Transfer, he ought to ſhew, at what Time he was there on that Day, and how long he ſtaid, for he ought to ſhew that he had done his utmoſt Endeavour to accompliſh his * Agreement; 'tis true, he need not ſet forth, that neither the Defendant, nor any Body elſe in his Behalf, was there, becauſe it ſhall not be intended, that another was there for him; but if the Truth was ſo, it muſt be ſet forth on the other Side: Now as to the Time, 'tis the laſt Time of the Day which the Law appoints for a Tender, but yet not ſo late in the Day, but that there may be Time enough for the Execution of the Agreement in what is tendered: Now in the Principal Caſe, the Stock can never be transferred, but when the Company's Houſe is open, and that is uſually at ſet Hours, as at ten of the Clock in the Morning; therefore the Plaintiff ſhould have ſet forth and averred the Uſage of the Company, and that he came at the proper Time, and ſtaid there till after the Houſe was ſhut.

* Yelv. 38.

3 Cro. 754. Yelv. 38.

Giles *verſus* Hart. Mich. 9 Will. III.

(6.) THIS Caſe is reported in 2 Salk. (which ſee there) to which may be added the Opinion of the Chief Juſtice Holt in this Caſe, (viz.) In an Indebitatus Aſſumpſit for Wares ſold and delivered; the Defendant pleaded a Tender on ſuch a Day, and that he hath been ready ever ſince to pay, &c. and upon Demurrer to this Plea he held, that where an Action of Debt is brought upon a Bond conditioned to pay a certain Sum on a certain Day, there a Tender at the Day, and that he hath been ready ever ſince to pay, is a good Plea; but 'tis not ſo in Aſſumpſit; for tho' he might be ready to pay ever ſince the Tender, yet that being after the Promiſe made, and probably after it was demanded to be paid, 'tis not good, for it not being paid, the Promiſe is broken, ſo 'tis likewiſe in Debt upon a ſingle Bill; therefore in theſe Caſes the Defendant muſt plead ſemper paratus: He held, that in an Action of Debt Tender and Refuſal might be

2 Salk. 622. In Debt on a Bond to pay a certain Sum on a Day, there a Tender on the Day, and *ſemper paratus*, is a good Plea, but not in *Aſſumpſit*.

be pleaded in Bar of the Damages, but not in Bar of the Action, for the Debt ſtill remains: That in Aſſumpſit a Tender likewiſe might be pleaded in Bar of the Damages; but of this there hath been ſome Doubt, for he held, that in ſuch Caſe the whole Demand being in Damages, a Plea in Bar to the Damages goes in Bar to the Action; therefore he ſaid he ſhould favour any Courſe to help a Defendant in ſuch Caſe, as by allowing him to bring a Sum of Money into Court, and praying Judgment, de ulterioribus damnis, or by confeſſing Damages to ſo much, which he is ready to pay, and pray that the Plaintiff may proceed at his Peril.

Horne *verſus* Lewin. Trin. 1699. B. R.

2 Salk. 583. *Petit judicium & damna*, not good; it ſhould be *de damnis*.

(7.) IN Avowry for Rent, the Plaintiff replied, that he was ready upon the Land on the Day of Payment till Sun-ſett, and no one was there to receive the Money, and that he is ſtill ready to pay it, and ſo petit judicium & damna, this was adjudged naught; but if it had been petit judicium de damnis, it had been good, for his being ready to pay excuſes the Damages, but doth not bar the other of his Rent.

TENOR. *See* Libel, 2.

Term

Term and Vacation.

(1.) A Recovery was ſuffered on the firſt Day of Michaelmas-Term, about eleven of the Clock in the Morning, and the Recoveror died in the ſame Morning about two Hours before; yet this was adjudged good, for the Writ was returnable three Days before, and the Judgment ſhall relate to that Day. Sid. 229. Where Judgment ſhall relate to the Day.

(2.) The Eſſoin-Day is the firſt Day of every Term in Reſpect to legal Proceedings, and Judgments ſhall relate to that Day, and not to the quarto die poſt; but if a Man is bound to appear, or to pay the Money on the firſt Day of the Term, tunc loquimur ut vulgus, and then the quarto die poſt is the firſt Day. 1 Cro. 102.

(3.) St. John's Day, non eſt Dies Juridicus, and therefore the Judges never ſit on that Day, unleſs it happen to be the firſt Day of the Term. 2 Cro. 16.

(4.) If the next Friday after Corpus Chriſti Day, happen to be on Midſummer-Day, yet that muſt be a Hall-Day, tho' otherwiſe it would not, for the Friday next after Corpus Chriſti is appointed by the Statute to be the firſt Day of Trinity-Term; and if this be not reckoned, the Term would not begin till Friday in the next Week following. 1 Roll. Rep. 29.

TIME. *See* Iſſues joined, 1.

Scott *verſus* Hogſon. Trin. 11 Will. III. B. R.

Aſſumpſit to run a Horſe at *ſuch a Time* as the Plaintiff ſhall appoint, and he ſets forth that he appointed *ſuch a Day*, good.

(1.) Aſſumpſit to run a Horſe at ſuch Time and Place as the Plaintiff ſhould appoint, and the Plaintiff declares, that he did appoint ſuch a Day; it was doubted, whether this was appointing a Time, which is more certain and determinate than a Day: But per Curiam, by appointing a Day the Law will ſupply the Reſt, and fix it to the moſt uſual and convenient Time of that Day.

Davy *verſus* Salter. Mich. 3 Annæ. B. R.

Mod. Caſes, 230.

(2.) A Writ of Inquiry was executed in tres ſeptimanas Trin. (which was on Sunday the 13th Day of June) and the Writ was returned to be executed on the 14th Day; and upon a Writ of Error brought it was inſiſted, that the Court could not take Notice of the * Days of the Month, if they did, then * Sunday ought not to be reckoned, but Monday inſtead thereof; that if Sunday be the firſt Day of the Term, all Judgments will be on a Sunday. Et per Holt Ch. Juſt. If Sunday happen to be the quarto die poſt, it muſt of Neceſſity go to the Monday following; and ſo 'tis of Eſſoins, for they cannot be held on a Sunday, and as to the Relation of Judgments to the firſt Day of the Term, it can only be to the firſt Juridical Day, and all Quindenams & octabis are inclusive. In this Court the Entry is, die lunæ proxime poſt, &c. which is inclusive; in the Common Pleas the Entry is, A die lunæ, and yet that is inclusive too of the Day; and he was of the ſame Opinion as in Harvey and Broad's Caſe.

* 1 Cro. 275. Jones 300. 1 Roll. Abr. 595. Yelv. 140. * 1 Cro. 11. 2 Cro. 16.

Styles 382.

(3.) Submiſſion to an Award by Bond dated 12 Septemb. ſo as it be made within ſix Days after the Date of the Bond, and it was made on that very Day on which the Bond was dated. Et per Curiam, 'Tis good, becauſe that Day ſhall be inclusive, and be taken to be one of the ſix Days.

(4.) Moved to quash an Indictment upon the Statute 13 H. 4. cap 7. for a Riot, because Inquisition was not taken within a Month, (viz. twenty-eight Days) after the Offence committed, which is expressly required by the Statute: Sed per Curiam, the Time shall be computed, not according to twenty-eight Days, but according to Kalendar Months. Sid. 186. 4 Mod. 96. Computation of Time according to the Kalendar.

TITHES.

(1.) ALL Things titheable which grow from the Earth immediately, either as a natural Product thereof, or by the Industry of Men, as Corn, Hey, Wood, Herbs, &c. are called predial Tithes. What are predial Tithes.

(2.) But those which do not arise immediately from the Earth, as Cattle, &c. and which are not the Product thereof, but are nourished by it, the Tithe thereof is called mixt Tithes. What are mixt Tithes.

(3.) But personal Tithes are from and in respect of the Labour of Men. What are personal Tithes.

(4.) All small Wood, under Timber, and likewise Timber, when cut down under twenty Years Growth, is called Sylva cædua, and titheable; but Timber-Trees, after twenty Years Growth, are not titheable, neither are the Loppings or the Bark, or the Boughs of such Trees titheable, because Part of the Trees themselves. Wood and Trees.

(5.) Sylva cædua cut down to sell shall pay Tithes, but not to burn in the House, or to repair the same, or to enclose, or to enlarge the House for necessary Habitation. *Silva cædua*, where it pays Tithes, where not.

(6.) If a Coppice is cut, and the Tithes paid, and afterwards the Roots are grubbed up, they shall not pay Tithes, because they are Parcel of the Inheritance, and of the Land. 1 Roll. 637. Roots grubbed up shall not pay Tithes.

(7.) Timber-Trees mortuæ, aridæ & putridæ, pay no Tithes, for being once discharged by being upwards of twenty Years Growth, they shall be always discharged. Cro. Eliz. 477. Trees more than twenty Years Growth pay no Tithe.

Diſcharge of Tithes.

(8.) Tithes may be diſcharged three Ways, either by real Compoſition, de modo Decimandi, or by Preſcription. (2.) By a general Preſcription, de non Decimando. (3.) Or by Grant.

Jones 368. Hob. 307. Diſcharge *de modo Decimandi.*

(9.) A Diſcharge by real Compoſition de modo Decimandi is where Money or Land is enjoyed by the Parſon, Time out of Mind, in Lieu of his Tithes; in this Caſe the Law always intends a Contract, or original Bargain, and this is a Charge which runs with the Land, and whereof any Lay-Owner ſhall take Advantage, for the Modus is become the Tithe, and the very Tithe in Specie is extinguiſhed.

Jones 368. Cro. Car. 422. Hob. 307. Hard. 315. Diſcharge by Preſcription.

(10.) (2.) A Diſcharge by Preſcription in non Decimando is a Privilege only incident to Spiritual Perſons; for as they are only capable of Tithes in Pernancy, ſo they only can diſcharge themſelves by a general Preſcription in non Decimando; this is therefore a perſonal Privilege which doth not run with the Land, ſo that if it be conveyed over, Tithes muſt be paid in Specie.

Diſcharge by Grant.

(11.) (3.) A Diſcharge by Grant, and this is either to particular Perſons or Corporations by the Pope's Bull, or to whole Orders of Men by Act of General Council, as to the Templars, Hoſpitallers, Ciſtertians, &c. and this Privilege is alſo perſonal, and cannot paſs from one Perſon to another; ſo that if the Land be conveyed over, or reverting to the Founder, the Alienee and the Heirs of the Founder ſhall pay Tithes.

By the Statute 27 H. 8.

(12.) Now theſe perſonal Privileges are to be conſidered as they ſtand affected by the Statute 27 H. 8. by which Statute all Abbeys, &c. under the yearly Value of 200l. per Annum, are given to the Crown; and becauſe there is no Clauſe in that Statute to revive and ſave all perſonal Privileges belonging to the Abbeys, &c. therefore they are deſtroyed and extinguiſhed.

By the Statute 31 H. 8.

(13.) By another Statute 31 H. 8. All Abbeys, &c. above the Value of 200l. per Annum, are likewiſe given to the King, and in that Statute there is a Clauſe to revive and preſerve all former Privileges.

1 Cro. 423. Jones 368. Hob. 307. Hard. 101.

(14.) Therefore theſe, whether diſcharged by Preſcription, Grant, or Compoſition, in the Hands of former Owners, continue in the ſame Manner diſcharged of Tithes in the Hands of the King or his Patentees.

Wharton *verſus* Leſle. Trin. 5 Will. III.

(15.) IN a Pariſh conſiſting of 700 Acres of arable, and 700 Acres of Paſture Lands; there were twenty-ſix Acres ſowed with Flax; adjudged by three Judges, contra Holt Ch. Juſt. that the Tithes thereof belong to the Vicar as a ſmall Tithe, being ſo in its Nature; but the Chief Juſtice held, that the Nature of the Tithes depends upon the Nature of the Thing it ſelf, and not upon the Nature of the Place where 'tis ſown.

3 Lev. 365. 4 Mod. 183. 3 Cro. 467. Hutt. 73. Moor 99. Owen 74.

TRADE.

Mayor of Wincheſter *verſus* Wilks. Paſch. 4 Annæ, B.R.

(1.) THE Corporation of Wincheſter declared upon a Cuſtom, that it was not lawful for any Perſon to exerciſe a Trade there, except homines liberi Gildæ mercatoriæ Civitatis illius, &c. Et per Curiam, it was agreed, that ſuch a Cuſtom in London might be good, becauſe their Cuſtoms are confirmed by many Acts of Parliament; but it was doubted, whether ſuch Cuſtom was good in any other City or Borough, for ſince the Defendant is at Liberty to live in that Place, 'tis unreaſonable to reſtrain him from uſing a lawful Means for his Support and Livelihood: However, per totam Curiam, this Declaration is naught; for non conſtat, that the Corporation hath Gilda mercatoria, and it doth not appear, whom the Homines liberi de Gilda mercatoria are; ſo they may be the whole Corporation, or ſome Part of them; and antiently the King's Grant to have Gildam mercatoriam, made them all a Corporation, (viz.) All the whole Will.

6. Mod. Caſes 21. 1 Salk. 203. Whether ſuch a Corporation hath *Gilda mercatoria.*

Bridget

Bridget Glaſs's *Caſe*. Mich. 8 Will. III.

* Cap. Par. 7. Information, where it muſt be brought in the proper County.

(2.) SHE was indicted before Commiſſioners of Oyer and Terminer at the Old Baily, on the Statute 1 & 2 * Ph. & Mar. by which 'tis enacted, that no Perſon living in the Country ſhall ſell any Haberdaſhers Wares by Retail, in any City or Town-corporate, except it be in open Fairs, on Pain of Forfeiture for every Offence, 6s. 8d. and of the Wares ſold, the one Moiety to the King, the other to him who ſhall ſeiſe and ſue for the ſame in any of the King's Courts of Record, by Bill, Plaint, Debt, Information, or otherwiſe, &c. and that the Defendant did ſell Haberdaſhers Wares, &c. contra formam Statuti: Mr. Northy moved to quaſh this Indictment, upon the Authority of * Gregory's Caſe and of † Farrington's Caſe, becauſe thoſe Words, (viz.) The King's Courts of Record extend only to the Courts at Weſtminſter: Et per Curiam, 'tis true, Juſtices of Peace have not any Juriſdiction in this Caſe; but it hath been ruled ſince Gregory's Caſe, that Juſtices of Oyer and Terminer may determine this Matter by Way of Indictment, tho' not by Information: But ſince the Statute hath preſcribed a particular Way to recover the Forfeiture, (viz.) by Action of Debt or Information, without mentioning an Indictment, therefore the Defendant is not indictable upon this Statute, for which Reaſon this Indictment was quaſhed.

* 6 Rep. 19.

† 1 Cro. 23.

Mary Read's *Caſe*.

Indictment for uſing a Trade not good.

(3.) SHE was indicted for uſing the Trade of a Linen Draper at B. not having ſerved ſeven Years Apprenticeſhip to that Trade, the Caption was Ad generalem Seſſionem Pacis tent' coram Majore and Burgeſſes of Bridgwater, infra Burgum de Bridgwater; it was objected, that an Indictment for this Offence cannot be taken at a Seſſions of a Town-Corporate, but only at the General Quarter-Seſſions of the County, and this by Virtue of the Statute 31 Eliz. and even in that Caſe it will not be ſufficient to ſay, ad generalem Seſſionem, but ad generalem quarterialem Seſſionem pacis, &c.

The King verſus Hicks. Mich. 4 Will. III. B. R.

* Cap. 4.

(4.) INformation was brought againſt the Defendant upon the Statute * 5 Eliz. for Uſing the Trade of, &c. not being Apprentice to it for ſeven Years; the Information was brought in this

this Court, and the Using the Trade was in Yorkshire. Et per Curiam, this Information will not lie here, because by the Statute *21 Jac. it must be brought in the proper County, and all Informations against the Form of the Statute will be void.

The Queen versus Eliz. Franklyn.

(5.) SHE was indicted at a Quarter Sessions of a Borough, for exercising a Trade, not having served seven Years Apprenticeship, and Mr. Eyre moved to quash it, because the Prosecution was commenced a Year after the Offence was committed. Et per Curiam, Upon View of the Statute of 5 Eliz. where a Moiety of the Forfeiture is given to the Informer, he must prosecute within the Year; but the Queen's Suit is not confined to the first Year, but she shall have another Year, where the Forfeiture is distributed by Moieties, and in such Case, where the Party neglects the first Year, she shall have the whole.

1 Salk. 370. Quashed on another Exception.

(6.) A Pippin-Monger is no Trade within the Statute 5 Eliz. but a Brewer is, Quære of an Upholsterer; but Plowing and Digging are not Trades within the Statute, for 'tis not Matter of Skill but of Strength.

1 Roll. Rep. 10. What Trade is within the Statute, what not.

TRAVERSE.

Anonymus. Hill. 1 Annæ.

(1.) THE Defendant was sued by the Name of John, and he pleaded, that he was baptized by the Name of Benjamin, and traversed, that ipse idem Johannes was ever known by the Name of John; and upon a general Demurrer to this Plea, per Holt Ch. Just. this Traverse is repugnant in itself, and very immaterial, for it had waived the precedent Matter of Baptism, which was well pleaded, and was now become the Substance of the Plea

Where a Traverse is repugnant.

Plea it ſelf; for now the Iſſue muſt be by what Name the Defendant was called or known, and not by what Name he was baptized, whereas he ought to have relied on his Name of Baptiſm, and concluded with it without a Traverſe, for a Man can have but one Name, therefore it imples, a Negative in itſelf, without ſaying he was never known by the Name of John, &c.

Bullen *verſus* Benſon. Mich. 10 Will. III. B. R.

Where a Plea is not good without a Traverſe.

(2.) DEBT upon a Sheriff's Bond for an Appearance dated 20 Novemb. 9 Will. 3. conditioned, that the Defendant ſhould appear in B. R. die lunæ prox' poſt quinden' Sancti Martini, &c. The Defendant pleaded the Statute, and that the Bond was primo deliberat' by him 30 Novemb. and that he was then taken and arreſted by the Plaintiff by a Writ returnable in Michaelmas-Term, &c. in B. R. and being ſo in Cuſtody the Plaintiff took this Bond, & hoc paratus eſt verificare. And upon a Demurrer to this Plea it was adjudged ill, for when the Defendant had pleaded, that the Bond was primo deliberat' on the 30th Day of November, he ſhould not have reſted there, but have traverſed, that he delivered it on the 20th of Novemb. according to Yelverton 138. for here the Date is material; for ſuppoſing the Arreſt was before the Return of the Writ, and then after the Return the Plaintiff took a Bond antedated; this Bond is void becauſe the Defendant was legally in Cuſtody for Want of Bail, and ought to have been kept in Cuſtody.

Beats *verſus* Simpſon. In C. B.

Virtute cujus is not traverſable.

(3.) THE Caſe was, ſt. Two Habeas Corpora were pleaded, and both of different Teſte and Returns, the other Side replied, that he was brought up Virtute of the firſt Writ Abſq; hoc, that he was brought up Virtute of the other Writ; and per Treby Ch. Juſt. a Virtute cujus is never traverſable, becauſe 'tis not a poſitive Allegation, but only a Deduction or Inference from another Matter. So is a prætextu cujus, and vigore cujus, and per quod, &c. for theſe Things, Nec augent nec diminuunt ſed confirmant tantum. Powel Juſtice agreed that Virtute cujus was in many Places no more than a bare Inference; but ſometimes when it took in Matter of Fact, then it ſignified ſomething by Way of Allegation, whereupon, &c. and then 'tis traverſable, and it may ſo happen that nothing elſe is traverſable.

Suppoſe two Writs are taken out againſt W. R. of the ſame Teſte, but of different Returns, and at the different Suits of A. and B. and afterwards A. procures a Warrant by which W. R. is arreſted, and he gives a Bail-Bond, and in an Action of Debt brought on this Bond, the Condition whereof was for the De-Defendant to appear die, &c. he (the Defendant) pleads the Statute, and that he was then in the Cuſtody of the Sheriff, by Vertue of a Writ returnable on another Day; the Plaintiff may reply, that he was in Cuſtody, &c. by Vertue of a Writ returnable, as in the Condition of the Bond, & non virtute Brevis prædict' in placito defendentis mentionat'; quod fuit conceſſum per Nevill & Blencow Juſtices: Quære tamen, for this is contrary to Greenvills Caſe, and againſt the Opinion of Hale Ch. Juſt.

Anonymus. Paſch. 9 Will. III. B. R.

(4.) WHERE a Matter is confeſſed and avoided it need not be traverſed. In Replevin the Defendant avowed, for that W. R. was ſeiſed and made a Leaſe to him (the Defendant) for one Year, and ſo juſtified the Taking, &c. Damage-feaſant. The Plaintiff replied, that true it is, that W. R. was ſeiſed, &c. but before he made a Leaſe to the Defendant he made another to the Plaintiff, which is ſtill in Being, and not determined, this is ſufficient without a Traverſe, becauſe the Title of the Defendant is confeſſed and avoided; but if the Plaintiff had traverſed the Leaſe of the Defendant, it would have been good upon a general Demurrer, being only in the Nature of a double Plea; but upon a Special Demurrer it had been naught.

Where a Matter is confeſſed and avoided, it need not be traverſed.

(5.) That the Inducement to a Traverſe ought always to contain ſufficient Title, but 'tis not material, whether the Matter is true or falſe: Now the Reaſon why the Inducement ſhould contain a Title, is becauſe a Man ought not to deny the Title of another, without ſhewing colourable Title in himſelf; for if the Title traverſed be found to be ill, and no Colour of Right or Title appears for him that traverſed that Title, then no Judgment could be given.

Cro. Car. 265, 266. Inducement to a Traverſe ought to contain a ſufficient Title.

But the Inducement to a traverſe can never be traverſed, becauſe that would be a Traverſe after a Traverſe, which would be not only infinite but abſurd, becauſe it would be to quit his own Title, and fall upon the Title of another.

Inducement to a Traverſe cannot be traverſed.

Groenvelt *verſus* Burwell *& al'* Trin. 12 Will. III. B. R.

* 1 Salk. 144, 200, 263. Where the Legality of a Warrant was put in Iſſue, 'tis ill.

(6.) THERE are ſome ſhort Notes of a Caſe between theſe Parties, but upon other Points, in * 1 Salk. but the Caſe was thus: ſ. In Treſpaſs and Falſe Impriſonment for an Aſſault, Beating, Wounding and Impriſoning him; the Defendant as to the Beating and Wounding, pleaded Not guilty, Et quoad Reſiduum tranſgreſſion', &c. he ſet forth a Power in the College of Phiſicians in London to examine and commit for ill Practiſe in Phiſick, and that they adjudged the Plaintiff guilty de malæ praxi, &c. and ſo they made a Warrant to the Defendant to arreſt him and to carry him to Newgate, by Vertue of which Warrant they did arreſt the Plaintiff, &c. Quæ eſt eadem reſid', &c. The Plaintiff proteſtando againſt the Power, for Plea ſaid, that the Defendant arreſted him de injuria ſua propria, & non Virtute Warranti pred'; and upon Demurrer to this Replication it was adjudged ill, for the Traverſe doth not deny that there was ſuch a Warrant, but the Legality of it, and that the Plaintiff was not taken by Vertue thereof, which implies, that he might be taken for ſome other Cauſe, and if that was his Caſe, then he ſhould have pleaded it Specially, and ſhew for what Cauſe he was taken: Now by this Replication it may be intended, that the Warrant was after the Arreſt, and that there was no ſuch Warrant, therefore he ſhould have traverſed Abſque hoc, that there was a Warrant, or Abſque hoc, that it iſſued before the Arreſt, and then a Matter of Fact (from whence a Queſtion in Law might ariſe) would have been put in Iſſue, and not the Legality of the Warrant, which is Matter of Law.

21 H. 6. fo. 5. B.

Radborne *verſus* Kennadale. Mich. 4 Jac. II. Rot. 640.

3 Mod. 311. In Treſpaſs and in an Avowry, if a Freehold is pleaded, it muſt be traverſed.

(7.) IN Replevin, the Defendant made Conuſance as Bailiff to Sir A. B. ſetting forth, that he was ſeiſed in Fee of the Place where, &c. and ſo juſtifies the Taking the Cattle Damage-feaſant: The Plaintiff in his Replication confeſſes the Seiſin of Sir A. B. the Son, but pleads, that his Father was ſeiſed, &c. in Fee, and made a Leaſe to W. R. for three Lives of the Place where, &c. that W. R. was dead, and that W. W. entred as Occupant, and made a Leaſe to the Plaintiff; and upon a Demurrer to this Replication in Bar, for that the Plaintiff had not traverſed the Seiſin in Fee of the Son, it was held per Curiam,

riam, relying upon the Caſe in * Bulſtrode, that either in Treſpaſs or in Avowry, if a Freehold is pleaded, it muſt be traverſed, unleſs the Party doth wholly * confeſs and avoid it by a defeaſible Title, only with this Difference; that if in an Action of Treſpaſs a Freehold is pleaded, the Party may traverſe it generally, without inducing his Traverſe by a Title, but in * Avowry, the Traverſe muſt be induced by ſetting forth a Title: Et per Curiam, the Want of a Traverſe is Matter of Subſtance in the principal Caſe, becauſe there are two Affirmatives in the Pleading, and that will not admit any Trial without a Traverſe, therefore 'tis not helped by a general Demurrer, but a ſuperfluous Traverſe is only Matter of Form, becauſe it doth the other Party no Injury.

* 1 Bulſt. 48.

* Dyer 171. 3 Cro. 650. Sid. 227.

* Owen 51.

1 Leon. 44. denied. 1 Roll. Rep. 204.

Newdigate *verſus* Selwin. Paſch. 2 Will. III. B. R.

(8.) IN Covenant for not keeping and employing his Apprentice; the Defendant pleaded, that from ſuch a Time to ſuch a Time he did keep and employ the ſaid Apprentice, and that then he ſervitium ipſius (the Defendant) deſeruit & reliquit & ab eo deceſſit & ulterius in ſervitio ſuo remanere neglixit & abinde poſtea hucuſq; ad loca incognita ſeſe elongavit & abſentavit; the Plaintiff replied and traverſed, abſque hoc quod ſervitium (the Defendant) deſeruit vel reliquit vel ab eo deceſſit, vel in ſervitio ſuo remanere (omitting neglexit) vel ſeſe elongavit; and upon a Demurrer to this Replication it was objected, that the Traverſe was multifarious, conſiſting in ſo many particulars in the Diſjunctive, and that by omitting the Word Neglexit, it was not Senſe: Sed per Curiam, the Traverſe is good, for 'tis purſuant to the Defendant's Plea, which may be traverſed, as he hath pleaded it; and that Part of it, which is Nonſenſe, will not hurt, becauſe the Traverſe is good without it.

Where a Traverſe is good, becauſe purſuant to the Plea.

Helliot *verſus* Selby. Trin. 2 Annæ.

(9.) THIS Caſe is reported in * 2 Salk. but upon another Point: ſi. In Replevin, the Defendant avowed Damage-feaſant; the Plaintiff replied, that W. R. was rite & legitime, ſeiſed of the Manor of H. and being ſo ſeiſed, did grant a Copyhold Meſſuage to him 12 Julii, in ſuch a Year, and that he had Common in the Place where, &c. for himſelf and Tenants, &c. The Defendant rejoins and traverſes, that W. R. was rite & legitime ſeiſed in Fee, and granted the Copyhold Meſſuage to the Plaintiff on the 12th of July, &c. and upon a Demurrer to this Rejoinder it was adjudged ill; for per Curiam, the Rite & legitime

* 2 Salk. 701. What is not traverſable.

gitime is not traverſable, nor the Day of the Grant; for if the Lord of the Manor was a Diſſeiſor, 'tis as to this Purpoſe the ſame Thing as if he was lawfully ſeiſed; and the Day of granting it is not material, for a Grant at one Day is a Grant at any Day.

Dyer 365. *contra.*

Longford *verſus* Webber. Hill. 2 & 3 Jac. II. Rot. 965.

Where a Juſtification upon a Poſſeſſion is not good.

(10.) IN Treſpaſs, the Defendant pleaded, that he was lawfully poſſeſſed of ſuch a Cloſe, and ſo juſtified the Taking the Cattle Damage-feaſant in his Cloſe; and upon a Demurrer to this Plea the Plaintiff had Judgment; for tho' it was inſiſted, that there was the ſame Reaſon for juſtifying upon a Poſſeſſion, that there was for maintaining an Action upon a bare Poſſeſſion; yet the Court held, that there never was ſuch a Traverſe as Abſq; hoc quod poſſeſſionatus fuit, for a Poſſeſſion cannot be but by Contract, but a Seiſin may be by Right or Wrong, and he who hath Seiſin, hath by Law a good Title againſt all Men but the Diſſeiſee, for he may maintain an Aſſiſe.

Horn *verſus* Lewin. Hill. 12 Will. III. B. R.

2 Salk. 583. Where a Traverſe is ill, where not.

(11.) IN Replevin, the Defendant avowed for a Rent-charge in arrear; the Plaintiff replied, de injuria ſua propria abſq; hoc, that the Rent was in arrear; and upon a Special Demurrer, for that this Replication and Traverſe amounted to no more than the General Iſſue; and per Curiam, this is not a proper Inducement to the Traverſe, as if in Treſpaſs a Man ſhould plead de injuria ſua propria abſq; hoc quod eſt culpabilis, ſo de injuria ſua propria * abſq; hoc quod he is Bailiff, and de injuria ſua propria abſq; hoc, that there was ſuch a Preſcription, theſe are naught, the natural and proper Plea to this Avowry had been nihil in aretro, which is quaſi the General Iſſue, ſo that this is a pleading Special Matter, which amounts to the General Iſſue; and no other Evidence can be given but ſuch as might have been given upon the proper Iſſue; therefore this Circumlocution is ill, becauſe it prolongs the Cauſe by enforcing the Avowant to an unneceſſary Replication; and tho' 'tis no more than Matter of Form, becauſe it doth not alter the Evidence; yet per Holt Ch. Juſt. this being upon a Special Demurrer, is naught.

*1 Roll. Rep. 46. Raſt. Ent. 557, 558, 630.

Anonymus. Pasch. 9 Will. III.

(12.) PER Holt Ch. Just. A Man ought to induce his Traverse, and the Reason is, because he ought not to deny the Title of another, till he shew some colourable Title in himself, for if the Title traversed be found naught, and no Colour or Right appears for him who traversed, it would happen, that no Judgment could be given; but an Inducement cannot be traversed, because that would be a Traverse after a Traverse, which would be not only infinite but absurd; for 'tis quitting his own Pretence of Title, and falling upon the Title of another. There must be an Inducement to a Traverse.

(13.) In Trespass for taking and carrying away his Goods 1 die Januarii, the Defendant justifies the Taking 2 die Januarii, quæ est eadem transgressio; adjudged naught upon a Demurrer, because he doth not Traverse the Time before and after; and to say quæ est eadem, &c. is not sufficient, because that is not traversable. 1 Vent. 184. Where the Time must be traversed before and after the Trespass.

(14.) In Trespass laid to be done 1 August, the Defendant justifies for Right of Common after the Corn is cut, and that after it was cut he put in his Cattle, absq; hoc quod est culpabilis aliter vel alio modo; and upon a Demurrer to this Plea it was adjudged ill, because it did not answer the Trespass done, 1 Aug. having no Reference to that Time. Where the Traverse doth not answer the Time.

(15.) In false Imprisonment, &c. the Defendant justified under a Latitat, and a Warrant thereon, virtute cujus he arrested the Plaintiff at H. &c. Absque hoc quod est culpabilis aliter vel alio modo; the Plaintiff replied, de injuria sua propria absq; tali causa; 'tis true, upon a Demurrer this Replication was held ill, because there was Matter of Record, (viz.) a Latitat and Matter of Fact, (viz.) An Arrest set forth in the Plea, which the Plaintiff ought to have answered in a particular Manner, and not generally, by saying absq; tali causa. 3 Lev. 65.

(16.) In Trespass for Breaking and Entring his Close, the Defendant justified by a Prescription to dig for Coals; the Plaintiff replied, de injuria sua propria absq; tali causa, but did not Traverse the Prescription in a particular Manner; and upon a Demurrer to this Replication it was objected, that the Plaintiff ought to have traversed thus (viz.) Absq; hoc, that the Defendant, and all those whose Estate he had in the Premisses, have, Time out of Mind, used to enter into the Close, &c. and to dig there for Coals. 2 Lutw. Kilburn v. Valence.

TREA-

TREASON.

The King versus Speke. Mich. 1 Will. III. B. R.

Judgment in High Treaſon reverſed, becauſe the Court did not demand of the Defendant what he had to ſay.

(1.) WRit of Erroꝛ to reverſe an Attainder of High Treaſon, the Erroꝛ aſſigned was, that upon Oyer of the Indictment, the Defendant Speke confeſſed it, and thereupon Judgment was given, but without demanding of him, what he had to ſay for himſelf, why Judgment ſhould not be given: And per Curiam, this is erroneous, foꝛ 'tis a neceſſary Queſtion, becauſe he may have a Pardon to plead, oꝛ may move in Arreſt of Judgment, foꝛ which Reaſon the Attainder was reverſed.

Before the Stat. 25 Ed. 3. Treaſon was an incertain Crime.

(2.) At Common Law, beforꝛe the Statute 25 Ed. 3. Treaſon was a very incertain Crime; foꝛ Killing the King's Meſſenger was Treaſon; ſo likewiſe where a Man grew popular, this was conſtrued to be Incroaching Royal Power, and held to be Treaſon, ſo that by the Exceſs of theſe Times, any Crime, by aggravating the Circumſtances thereof, was heightened into Treaſon.

(3.) Therefoꝛe this Statute was made to determine what ſhould be Treaſon; and ſince it was made, there can be no conſtructive Treaſon, (i. e.) nothing can be conſtrued to be Treaſon, which is not literally ſpecified in that Statute; therefoꝛe counterfeiting the Coin is Treaſon within the Letter of this Act, but Waſhing it is not, noꝛ Filing oꝛ Clipping, tho' within the ſame Miſchief and Effect, foꝛ this Statute muſt not be conſtrued by Equity, becauſe 'tis a declarative Law, and one Declaration ought not to be a Declaration of another; beſides, it was made to ſecure the Subject in his Life, Liberty and Eſtate, which by admitting Conſtructions to be made of it might deſtroy all.

1 Vent. 349. Treaſon done beyond Sea may be tried in *Middleſex*.

(4.) The Defendant was indicted foꝛ High Treaſon in raiſing a Rebellion in Carolina in America, and tried at Bar in Weſtminſter-Hall and acquitted; and it was held, that this Trial was good by Vertue of the Statute 25 H. 8. cap. 2. by which 'tis enacted, that foreign Treaſons, may be tried by a Special Commiſ-

sion, or by the Court of King's Bench by a Jury of Middlesex, that being the County in which that Court sits.

TRESPASS.

Lambert *versus* Thurston. Pasch. 2 Will. III. B. R.

(1.) TRespass for breaking his Close vi & armis & damnum 20l. and upon a Demurrer to this Declaration, it was objected, that the Damages being laid to be under 40s. the Suit ought to have been in the County-Court; Sed per Curiam, The Trespass is alledged to be done vi & armis, and for that Reason the County-Court cannot hold Plea of it, for they cannot Fine, being no Court of Record, and 'tis at the Plaintiffs Election to declare vi & armis or not.

3 Mod. 275. Trespass *vi & armis* cannot be tried in the County-Court. 43 Ed. 3. 21. b. 2 Inst. 311. F. N. B. 47. 1 Mod. 215.

Brook *versus* Bishop. Hill. 1 Annæ B. R.

(2.) TRespass, Quare vi & armis 2 die Aprilis, the Defendant clausum (of the Plaintiff) fregit & intravit & herbam suam pedibus ambulando conculcavit & consumpsit, and also for cutting down his Under-Wood and Trees, transgressiones pred' a prædicto secundo die Aprilis usq; 28 ejusdem mensis diversis diebus & vicibus continuando. Upon Not guilty pleaded, the Plaintiff had a Verdict and entire Damages; it was moved in Arrest of Judgment, that the Cutting the Trees did not lie in Continuance. Et per Holt Ch. Just. That is very true, but then the Continuando is void as to that Trespass and Damages shall be intended to be given by the Jury for those Trespasses of which there might be a Continuance; but then it was objected, that the Plaintiff at the Trial gave Evidence of the Defendant's cutting Trees and Under-Wood at several Times, which per Curiam, could not be upon this Declaration, at least it ought not to

2 Salk. 639. Trespass with a *Continuando*, not good.

to have been, and therefore shall not be intended: But the Way to declare for such Trespasses which lie in Continuance, and if the Plaintiff would give Evidence of several Trespasses, is for him to set forth in his Declaration, that the Defendant, between such a Day and such a Day cut several Trees, and not to lay a Continuando transgressiones from such a Day to such a Day; and upon such a Declaration he may give in Evidence a Cutting on any Day within those Days; so is the Year-Book * 21 H. 6. In Trespass, for that the Defendant, between such a Day and such a Day, per diversas Vices took and carried away so much Corn, Quod nota for the Right Way of declaring: Et per Powell Justice, the Practice was to give in Evidence several Trespasses upon the Way of declaring, as in this Case, but that it was Wrong; and if the Plaintiff had done so at the Trial, as it was alledged, he ought not to have Judgment.

* 21 H. 6. 43. 2 Lev. 210.

Gipps *versus* Wollescot. Trin 7 Will. III. B. R. Rot. 301.

Trespass for fishing and taking *Salmones*, and did not say *suos*, not good.

(3.) TRespass against the Defendant, for that he in separali piscaria & in libera piscaria sua apud H. piscavit, and did take and carry away 500 Salmons. Per Holt Ch. Just. a Man may have a free Fishery in his own Soil; as for Instance, suppose he hath a River within his Manor, and another hath a Right of fishing with him; but because it was not said Salmones suos, nor ibidem cepit, the Defendant had Judgment. The same Point was adjudged Pasch. 5 Will. 3. between Smith and Kemp.

Sid 239.

(4.) Per Curiam, In Trespass the Defendant may plead a Title; but if an Action of Trespass be brought for the Mesne Profits, after a Recovery in Ejectment the Defendant can neither plead a Title or give it in Evidence.

1 Vent. 329. Trespass with a *Continuando*, not good.

(5.) In Trespass for Fishing in his several Fishery, and for taking twenty Bushels of Oysters, continuando piscationem prædict', from such a Day to the Time of the Action brought: Upon Not guilty pleaded, the Plaintiff had a Verdict, but could never get Judgment upon the Authority of * Playter's Case, because the Fishing mentioned under the Continuando was incertain, not expressing the Quantity or Quality of the Fish; 'tis true Hale Ch. Just. said, that they were more strict formerly in the Certainty of Pleading than now, for now an Indebitatus Assumpsit for Goods sold is held well, without any farther Certainty.

(6.) In Treſpaſs for breaking his Cloſe and Eating his Graſs with Cattle; the Defendant pleaded, that at the Time of the Treſpaſs, &c. he was poſſeſſed of all the Corn growing on four Acres of Land Parcel of the locus in quo) as of his proper Goods, by Reaſon whereof at the Time in which the Treſpaſs was ſuppoſed to be done, he entred with his Cattle to mow, take and carry away the Corn, and in entring, the ſaid Cattle did the Treſpaſs, ſparſim & raptim, and ſo juſtifies the Treſpaſs preciſely; and upon Demurrer this Plea was adjudged ill, becauſe the Defendant did not ſet forth any Title which he had to the Corn, but only that he was poſſeſſed thereof, which is not ſufficient without a Title, becauſe the Property ſhall be intended to be in the Owner of the Soil.

2 Saund. 401. Where the Defendant pleads a Poſſeſſion, but did not ſet forth a Title, not good.

Trial and New Trial.

King *verſus* Alberton. Mich. 10 Will. III. B. R.

(1.) A Motion was made for a New Trial, becauſe the Defendant having pleaded a Compoſition with his Creditors had forgot to carry down Witneſſes at the Trial to prove the Subſcribers Hands. Sed per Curiam, it was denied, becauſe the Plaintiff ſued for an honeſt Debt, and Holt Ch. Juſt. remembred the Caſe of an Action of Debt brought againſt an Heir, who pleaded Reins per deſcent, upon which they were at Iſſue, and there was a Verdict againſt the Heir, becauſe he had not brought the Settlement with him, by which he was ſeiſed of an Eſtate-tail, and for this Reaſon he moved for a New Trial; but it was denied, becauſe the Plaintiff had recovered an honeſt Debt.

Where a New Trial ſhall not be granted.

Anonymus.

Where the Trial ſhall be *per medietatem linguæ*, where not.

(2.) IN Covenant, after a Verdict for the Plaintiff, the Defendant moved for a New Trial, ſuggeſting that he was an Alien, and that the Sheriff had returned twelve of the Jury, but that there was not an Alien amongſt them: Et per Curiam, the Defendant ſhall never have a Trial per medietatem linguæ, without Prayer, and if 'tis granted, and the Sheriff returns none but Denizens, the Defendant ought to challenge them before the Trial; and if the Challenge is not allowed, then to inſiſt on a Bill of Exceptions; but the Suggeſtion now made by this Defendant is againſt the Record; and if 'tis true, he may have an Action againſt the Sheriff for a falſe Return.

Note, If an Alien is ſued as Executor he ſhall not have a Trial per medietatem linguæ, becauſe in ſuch Caſe he is ſued in auter Droit.

Sir Ch. Berrington's *Caſe, & al'.* 2 Mich. 5 Annæ B R.

Treſpaſs againſt ſeveral Defendants, the Plaintiff had a Verdict, but as to one of them it was againſt Evidence, no New Trial was granted.

(3.) IN Treſpaſs and Falſe Impriſonment againſt ſeveral Defendants, the Plaintiff had a Verdict; and afterwards it was moved for a New Trial, becauſe as to one of the Defendants the Verdict was againſt Evidence. Sed per Curiam, This cannot be done, for the Court cannot ſet aſide the Verdict as to ſome, and not as to others, and to grant a new Trial as to all would be a Prejudice to thoſe who are duly acquitted.

Anonymus.

No New Trial on an Indictment for Perjury.

(4.) THE Attorney General moved for a New Trial at Bar for the King, upon an Indictment for Perjury, but it was denied, becauſe the King is not intereſted in the Indictment, otherwiſe than in Point of Common Juſtice.

Anonymus. Paſch. 1702. B. R.

Of carrying down a Cauſe by Proviſo.

(5.) RULED, that if the Plaintiff would not enter his Iſſue, or if 'tis entred, and he will not carry down the Cauſe to Trial, the Defendant may by Rule compel him to enter it, and

if 'tis entered, the Defendant may carry it down by Proviſo; and that this is the ſtanding Rule of the Court; and in this Caſe Serjeant Darnel moved, that the Plaintiff's Evidence depending on certain Town-Books in the Cuſtody of the Defendant, and that he having refuſed to give Copies thereof, &c. that the Plaintiff might not be compelled to proceed till the Defendant gave him Copies, but it was denied; for per Holt Ch. Juſt. the Defendant is not bound to help the Plaintiff to Evidence againſt himſelf.

The Defendant not bound to help the Plaintiff to Evidence.

Regula. Hill. 16 Car. II. B. R.

(6.) ORdinatum eſt, quod niſi cauſæ triandæ apud London & Middleſex intratæ fuerint cum capitali Juſtitiario hujus Curiæ per ſpatium duarum dierum ante Seſſionem qua triandæ ſunt, mareſcallus poteſt intrare Ne recipiatur ad inſtantiam defendentis vel ejus Attornati, &c. Rule.

Hall *verſus* Hill. Mich. 1 Annæ.

(7.) IN an Action brought in an inferior Court, (viz.) in the Court at Briſtol, the Plaintiff had a Verdict and Coſts taxed; and after a ſecond Scire facias againſt the Bail, the Judge of that Court granted a new Trial, and thereupon the Court of B. R. being moved, made a Rule for the Judge of the inferior Court, to ſhew Cauſe why an Attachment ſhould not be granted againſt him: For per Curiam, tho' a new Trial ought to be allowed, if freſhly purſued, yet 'tis a Misdemeanor in a Judge to grant a new Trial after the Party hath reſted ſo long under a former Trial; and it may be a Queſtion, whether any Court can grant a new Trial to be had before themſelves: There cannot be a New Trial at Bar as there may at Niſi prius, for in the laſt Caſe 'tis but reaſonable, that the Court ſhould judge how the Judge of Niſi prius has executed his Authority. Judges of an inferior Court granted a New Trial after a ſecond *Scire facias* was brought againſt the Bail.

(8.) Covenant was brought by the Plaintiff in Hampſhire, for not repairing a Houſe in Berkſhire, and Iſſue being joined upon Non infregit conventionem, the Cauſe was tried in Hampſhire, and the Plaintiff had a Verdict, but could never get Judgment; for per Curiam, this is a Miſ-trial, becauſe this being a Special Iſſue, nothing can be given in Evidence but the not Repairing in Berkſhire, eſpecially ſince the Suit is between the very Parties to the Deed, and not between Aſſignees. Sid. 157. Of a Miſtrial in an improper County.

Sid. 325. 1 Lev. 208. Trial good, if by the County where the Matter in Issue doth arise. *Postea* 11. S.P.

(9.) Debt upon Bond, the Action was laid in London, and the Condition was, for Performance of Covenants in an Indenture, by which a Walk, called Shrubwalk, in the County of Northampton, was granted, &c. and the Venue was of Shrubwalk, and the Cause was tried in Northampton; and after a Verdict for the Plaintiff it was insisted, that here was a Mis-trial, because the Venire facias could not come from a Walk in a Forrest, which is only an Office or Liberty: Sed per Curiam, this being tried by a Jury where the Matter in Issue did arise, 'tis within the Statute 16 & 17 Car. 2. cap. 8. 'tis true, the Words of that Statute are, (viz.) It shall be good, if tried by the County where the Action is laid, but that must be understood by the County where the Matter in Issue doth arise; for otherwise it would destroy the whole Law concerning Juries, to try it in a County foreign to the Issue, as it may, if tried in the County where the Action is laid.

Sid. 60, 118. Where the Plaintiff may lay his Action in what County he will.

(10.) The Plaintiff was Apprentice to the Defendant, who covenanted to instruct him in such a Trade, and for not performing it, an Action of Covenant was brought and laid in Middlesex; the Defendant pleaded a Departure out of his Service in London; and upon a Demurrer to this Plea it was insisted for the Defendant, that the Venue ought to be from London, where the Departure was, and the rather, because the Cause of Action in Middlesex was admitted by the Demurrer: Sed per Curiam, in personal Actions, and in such which are transitory, the Plaintiff may lay his Action in what County he will, and the Jury ought to find all local Acts, tho' in another County.

Antea 9. S. P.

(11.) Covenant, and the Action was laid in London, and Issue was joined upon a Feoffment in Oxfordshire, of Lands in that County, and the Cause was tried in London; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that this was a Mis-trial, because a Feoffment of Lands in Oxfordshire is local, and therefore the Cause ought to have been there: Sed per Curiam, this is helped by the Statute 17 Car. 2. being tried in the County where the Action was brought.

3 Mod. 405. Where a wrong *Venue* is aided by the Statute.

(12.) Covenant for not repairing a House in Chester, the Defendant pleaded reparavit, upon which they were at Issue, and the Venire facias was from the County of Chester at large; after a Verdict for the Plaintiff it was objected, this was a Mis-trial, for the Issue being local, (viz.) at Chester generally, and the Trial being in the County of Chester at large, it was by a Jury of a wrong County: And per Curiam, this is not aided by any Statute, but only a wrong Venue in a proper County, as if the Issue is at Islington in Middlesex, and the Venue is of Hampsted in the same County, that is Right, but the Venue is Wrong, and that is aided.

TROVER.

(1.) IN Trover, the Plaintiff declared for ten Pair of Curtains and Vallance, good, without shewing the Kind and Quantum of Stuff, and so it is of any such artificial Things. 2 Saund. 74.

(2.) It lies de Denariis, tho' out of a Bag, for the Action is not to recover the Money, but the Damages. 1 Cro. 89.

(3.) It lies for a Spaniel, but not for an Hawk unless reclaimed, and the Reason is for Want of Property, and therefore the Plaintiff always proves a Property in himself and a Conversion by the Defendant. 1 Mod. 243.

(4.) Trover for an House, the Defendants justify the Taking as a Distress for Toll; naught upon a Demurrer, because the Conversion is not answered, for a Distress is no Conversion. Hutt. 10. Hob. 187. S. C. 10 Rep. 46.

(5.) Trover, &c. for 100 Sheep, the Defendant justified under a Fieri facias, by Vertue whereof he took them in Execution: Et per Curiam, upon Demurrer this was adjudged ill, because this Plea doth not answer the Conversion, he should have pleaded Not guilty, and given this Matter in Evidence at the Trial.

(6.) Trover against Husband and Wife, the Plaintiff cannot declare of a Conversion by the Husband and Wife, to the Use of the Wife, or to the Use of the Husband and Wife.

(7.) But he may declare of a Conversion by the Husband and Wife, to the Use of the Husband, or that the Wife converted the Goods to the Use of a Stranger, but not to her own Use, or that she converted them to the Use of her and her Husband.

(8.) Where the Defendant comes to the Possession by finding, in such Case Denial is a Conversion; but if he had the Goods by Delivery, there Denial is no Conversion, but Evidence of a Conversion; now in both those Cases the Defendant had a lawful Possession, (viz.) either by Finding or by Delivery, and where the Possession is lawful, the Plaintiff must shew a Demand and a Refusal, to make a Conversion.

But if the Possession was tortious, as if the Defendant takes away the Plaintiff's Hat, there the very Taking is a sufficient Proof of the Conversion.

Fuller

Fuller *verſus* Smith. Mich. 8 Will. III. B. R.

Converſion is the Gift of the Action.

(9.) IN Trover, the Plaintiff declared of a Finding by ten Perſons, and that nine of them converted the Goods; upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment in C. B. but upon a Writ of Error in B. R. the Judgment was reverſed, becauſe the Converſion is the Giſt of the Action, for if a Man finds Goods, 'tis lawful for him to take them up.

Benbrigg *verſus* Day. Hill. 3 Will. III. B. R.

Where the Plaintiff may take ſeveral Damages, and releaſe them as to one Thing which is incertain.

(10.) TRover for ſeveral Things, and amongſt the reſt pro duobus falcris, and upon a Demurrer to the Declaration, for that falcris was an inſenſible Word: Holt Ch. Juſt. would not abate the Declaration, becauſe he ſaid that the Plaintiff might take ſeveral Damages as to the other Things, and might releaſe them as to this Word, and ſo take Judgment for the reſt.

Hartford *verſus* Jones. Mich. 10 Will. III. B. R.

2 Salk. 654. Upon another Point. What Plea is good in Trover, what not.

(11.) IN Trover and Converſion, the Defendant may plead Not guilty, and give in Evidence, that he diſtrained the Goods, and detained them till he was paid, but he cannot plead ſpecially, that he took the Goods by Diſtreſs, or that he detained them as Host till paid for the Horſes ſtanding, & ſic de ſimilibus, for the Converſion is lawful, and none is confeſſed; but if he pleads a Matter which confeſſes a Converſion, and avoids it, as the Caſe is in * Yelverton; 'tis good per Holt Ch. Juſt. and ſo it was adjudged in this Caſe.

* Yelv. 198.

1 Vent. 211.

(12.) Trover de duobus Centenis plumbis Uræ, Anglice, Two hundred Tun of Lead Ore, it was objected, that Centena was properly an Hundred in a County: Sed per Curiam, 'tis good, as here with an Anglice, ſo 'tis de duobus ponderibus Caſei, Anglice, two Weighs of Cheeſe; ſo 'tis de duobus oneribus Cupri, Anglice, two Horſe-Loads of Copper, for theſe Words are to be underſtood according to the Subject Matter.

2 Saund. 74.

(13.) In Trover, the Plaintiff declared for ten Pair of Curtains and Vallance, good, without ſhewing the Kind and Quantum of the Stuff, and ſo 'tis of ſuch artificial Things; but Trover for Planks, unleſs the Plaintiff ſets forth how many, is not good; but for Planks in his Granary, or for Books in his Study, is good.

Sid. 98.
2 Vent. 78.

(14.) In Trover for Letters Patents of Wine-Licence, after a Verdict for the Plaintiff, it was objected, that Letters Patents are a Record, and there cannot be a Conversion of a Record. Sed per Curiam, the Letters Patents in the Declaration are only an Exemplification of those under the Great Seal, for which Trover lies, and they may be converted. Hardr. 111.

TRUST.

(1.) THE Father sold the antient Estate of the Family, and with the Money purchased a new Estate in his and his Son's Name; the Father devised the Lands to his Grandson, and died, the Devisee pretending, that the elded Son, who joined in the Purchase with his Father, was only a Trustee. Sed per Curiam, Where the Purchase is to the Father and Son, he shall never be taken to be a meer Trustee, unless so expressly declared, but it shall be intended as an Advancement of the Son, especially if he is not otherwise advanced, or left unprovided; and it was the antient Way to join the Son in all Purchases to prevent Wardship. Ch. Rep. 25. 2 Ch. Rep. 231. Where the Son is joined with the Father in a Purchase it shall be intended for his Advancement.

(2.) Where a Trustee is to pay Debts, Legacies, or Portions out of the annual Rents, Issues, and Profits of the Estate, he cannot alien or sell to raise the Money, unless 'tis to be paid at a certain and prefixed Time; and if the annual Profits will not do it within that Time, then he may sell, for 'tis within the Intention of the Trust. *Ibidem.* Where Money is to be paid out of the Profits, &c. the Lands cannot be sold.

(3.) The Testatrix made W. R. her Executor, and gave all her Estate real and personal for the Payment of her Debts and Legacies, and amongst other Legacies she gave 200 l. to her Uncle, who was Heir at Law; per Curiam, this is a Devise of the Lands to W. R. in Fee, and no implied Trust in him for the Benefit of the Heir, as to the Surplus, after Debts and Legacies paid; for if that had been intended by the Testatrix, then the Devise of 200 l. to him had been to no Purpose. Devise of all her real and personal Estate is a Devise in Fee. *Ibidem.* 193.

(4.) The

1 Ch. Rep. 225. See 266. Where the Wife assigns her Term before Marriage, the Husband can never charge it.

(4.) The Wife having assigned her Term before Marriage, the Husband mortgaged the Trust. Et per Curiam, where a Term is settled in Trust for a Jointure, or in Pursuance of Marriage Articles, or if it be the Term of the Wife, and assigned by her before Marriage, the Husband can neither charge, dispose or forfeit it by Outlawry, and this hath been the constant Course in Chancery since Queen Elizabeth's Reign; but if the Assignment is made after Marriage in Trust for the Wife, 'tis then voluntary and fraudulent.

Hard. 495. Trust of a Fee-simple or Tail, is forfeited by Treason.

(5.) A Trust of a Fee or Tail is forfeited by Treason, but not by Felony; for such Forfeiture is by Way of Escheat, and an Escheat cannot be but where there is a Defect of a Tenant, but here is a Tenant.

VARIANCE.

Raym. 398. Variance, where 'tis amendable by the Statute 16 & 17 Car. 2.

(1.) IN Ejectment for a Messuage, with the Appurtenances: Upon Not guilty pleaded, the Plaintiff had a Verdict, Quoad parcellam Messuagii jacen' next the Messuage of F. Neev, and the Judgment was, that the Plaintiff recover the Term of and in Parcel of a Messuage lying next the Messuage in the Occupation of F. Neev, so that the Verdict was for a Messuage next the Messuage of F. Neev, and the Judgment was for a Messuage next another Messuage, in the Occupation of F. Neev; now admitting this is a Variance 'tis amendable by the Statute 16 & 17 Car. 2. cap. 8. (viz.) The Words are, All such Omissions, Variances, Defects, and other Matters of like Nature, not being against the Right of the Matter of the Suit, shall be amended: But a Messuage of F. Neev, and a Messuage in the Occupation of F. Neev, seems to be no material Variance.

Postea, 9. S. P. Variance between the Writ and Declaration.

(2.) In Replevin for taking averia, and the Writ and Declaration were both for taking Averia, (viz.) a Mare; and upon a Demurrer it was objected, that a Mare could not be averia; and for this Variance between the Writ and the Declaration, the Defendant had Judgment. 2 Lutw. Ginns Case.

(3.) Error to reverse a Judgment in C. B. in Ejectment, the Writ was abated, for that it was to remove the Proceedings between W. R. and W. W. of the City of Exceter, in the County of the City, and a Blank was left for the Addition, and the Record certified was, that W. R. of North Moulton in the County of Devon Yeoman, was attached to Answer W. W. Clerk; and for this Variance between W. R. in the Writ, and W. R. with the Addition in the Record certified, it was abated. Sid. 103. Between the Writ of Error and Record certified.

(4.) Error to reverse a Judgment in C. B. in Trespass, the Writ was W. R. de, &c. in Com. Warwick, and the Record certified was W. R. de, &c. in Com. Lincoln. Per Curiam, 'tis a material Variance, and by Reason whereof the Record was not removed. Sid. 193. Between the Writ of Error and Record certified.

(5.) Writ of Error in the Exchequer-Chamber to remove a Record out of B. R. of a certain Trespass the Husband and Wife had done, and the Record certified was of a Trespass done by the Woman alone, and for this Variance the Writ was abated. Sid. 269. Between the Writ of Error and the Record certified.

Burr *versus* Atwood. Mich. 1 Annæ.

(6.) THE Plaintiff obtained Judgment in a Scire facias upon a Recognisance against the Bail, and now upon a Writ of Error brought, it was Quod in adjudicatione executionis Judicii prædict' Error intervenit manifestus, &c. adjudged this was naught, it should have been in adjudicatione executionis Recognitionis prædict', because a Recognisance is not such a Judgment as might or would be intended on the Face of the Writ of Error. Writ of Error in which the Judgment was misrecited.

King *versus* Ewer. Pasch. 1 Annæ B. R.

(7.) IN a Scire facias upon a Recognisance removed by Certiorari, and upon Oyer entred in hæc verba, the Condition of the Recognisance recited in the Scire facias was, that the Defendant should give Notice of Trial Prosecutori Et ejus Clerico, whereas the Recognisance it self was, Prosecutori Aut ejus Clerico; and per Curiam, this is a Variance and quite different, so the Defendant had Judgment. Where *Et* instead of *Aut* was recited in the *Scire facias*.

Anonymus. Paſch. 5 Will. III. B. R.

Between the Original and the Declaration.

(8.) IN Treſpaſs and Battery brought againſt Huſband and Wife, the Original as it was recited in the Declaration was of a Battery only at one Time, but the Declaration it ſelf was of ſeveral Batteries done by them at ſeveral Times. And the Defendant pleaded to the ſeveral Batteries, but the Plaintiff replied only as to one of them, and at the Trial had a Verdict, and upon a Motion to ſet it aſide for this Variance, per Curiam, The Original being recited in the Declaration, but not ſet out upon Oyer craved, it ſhall be intended to be Right, but miſrecited in the Top of the Declaration; and the Plaintiff's not Replying to the other Batteries is but a Diſcontinuance, which is helped by a Verdict.

Anonymus.

Antea, 2 S.P.

(9.) IN Replevin, The Writ was Quare cepit averia, and the Declaration was Quare cepit unam equam. Et per Powell, This Variance between the Writ and Declaration, is naught even after a Verdict, which Treby Ch. Juſt. denied; 'tis true 'tis naught upon a Demurrer, but 'tis cured by the Oxford Act after a Verdict.

VENIRE FACIAS.

(1.) A Venire facias ad reſpondendum may be without a Day certain, becauſe by an Appearance the Fault in this Proceſs is aided, but a Venire facias ad triand' exitum, muſt be returnable on a Day certain. Sid. 100.

(2.) Upon an Indiament before Juſtices of Peace in their Quarter-Seſſions, or before Juſtices of Oyer and Terminer, there muſt be fifteen Days between the Teſte and Return of the Venire facias; but if the Entry be ex aſſenſu Partium, then the Venire facias may be returnable immediate before the Juſtices of Peace, &c. 1 Cro. 583. Sid. 99.

(3.) But before Juſtices of Oyer and Terminer and Gaol-Delivery, an Indictment may be found and tried the ſame Day, for they may award a Venire facias returnable immediate, and ſo may the King's Bench for all Offences done in Middleſex, that being the County in which that Court ſits, but not for Offences done out of that County, becauſe as to ſuch 'tis not a Court of Oyer, &c. 1 Cro. 448. Style 28, 29.

(4.) Where an imperfect Verdict is given in an Aſſiſe, the ſame Recogniſors may be reſummoned by Certificate of the Aſſiſe to explain that Verdict, becauſe this is feſtinum Remedium, but in all other Caſes, where the Jury come in by Proceſs judicial, if an imperfect Verdict is received and recorded, no alias Venire facias or Niſi prius will lie for the ſame Jury, but there muſt be a Venire facias de novo; 'tis true if a Jury is diſcharged upon a Demurrer to the Evidence, and without giving any Verdict, there an alias Venire facias will lie for the ſame Jury, but where a Verdict is ſet aſide, there muſt be a Venire facias de novo, becauſe the ſame Jury cannot ſtand indifferent to try the ſame Cauſe again. 3 Cro. 33. 8 Rep. 66. Allen 18.

(5.) A Venire facias de Vicineto Villæ, &c. is good in a ſuperior Court, becauſe their Juriſdiction is general, but 'tis not ſo in an inferior Court, becauſe their Juriſdiction is circumſcribed to the Vill only, therefore the Venire facias muſt be de Villa, and not de Vicineto Villæ, but this is contradicted by the later * Authorities, for it ſhall be intended, that their Liberty extended beyond the Vill. Noy 66. in Greſman's *Caſe*. * Jones 171. Latch 208.

VERDICT.

Vaugh. 111, 117. Incertain Verdict.

(1.) IN a Special Verdict in Treſpaſs brought againſt Sir Rich. Cox Baronet, Rich. Cox Eſq; and others; upon Not guilty, the Jury find a Warrant of a Juſtice of Peace, commanding the Conſtable to arreſt the Plaintiff, virtute cujus he was arreſted, and that the Conſtable required the other Defendants to aſſiſt him to convey the Plaintiff before a Juſtice of Peace, and that they brought him to the Conſtable's Houſe, and that prædict' Richardus Cox Miles, ſent for the Conſtable, and commanded him to put the Plaintiff in the Stocks, whereas there was no ſuch Perſon as prædictus Richardus Cox Miles, before-mentioned in the Record: Et per Curiam, this made the Verdict very incertain.

Sid. 203.

(2.) The Jury were charged at the Aſſiſes with an Iſſue concerning a Copyhold, and one of them, after they were gone from the Bar, had a Court-Roll, and told the reſt, that he knew the Matter, and that it was for the Plaintiff, but the other Eleven being of another Opinion before they ſaw the Roll, left the Matter to this Juror, and ſo they brought in a Verdict for the Plaintiff, but it was ſet aſide, and a new Trial granted.

Cattle & al' *verſus* Andrews. Hill. 5 Will. III. Rot. 826.

Not guilty as to Part, and they gave no Verdict as to the reſt.

1 Inſtit. 227.

(3.) ERror of a Judgment in C. B. in an Action of Treſpaſs, wherein the Plaintiff declared againſt the Defendant for ſeveral Treſpaſſes, (viz.) for Breaking and Entring his Cloſe, Treading down his Graſs, and Taking and Carrying away Water; the Defendant juſtifies as to all, upon which they were at Iſſue, and the Jury found him Not guilty as to the Treading, but gave no Verdict as to the other Matters, this was adjudged naught, and for this Cauſe the Judgment was reverſed.

Anonymus. Hill. 1697. *at* Guildhall, coram Holt *Chief Justice.*

(4.) Assumpsit against two, and there was Judgment by Default against one of them, the other pleaded Payment in Satisfaction of the whole Debt, but at the Trial proved only Payment of his Share: Et per Holt Ch. Just. if the Jury find a Discharge only as to this Defendant, they must find for the Plaintiff, and so they must, tho' they find the Payment was for the whole Debt, because the other Defendant hath confessed the Action, and the Finding of the Jury cannot discharge him, which was done accordingly, and small Damages given. Where the Defendant confesseth the Action, the Finding of the Jury will not discharge him.

(5.) Verdicts shall not be taken so strictly as Pleadings, but the Substance of the Thing in Issue ought to be alw.ys found. Jones 28, 61.

(6.) In all Cases and in all Actions the Jury may give a General or Special Verdict, as well in Causes Criminal as Civil, and the Court ought to receive it, if pertinent to the Point in Issue, for if the Jury Doubt they may refer themselves to the Court, but are not bound so to do. Where the Jury may give a General or Special Verdict.

(7.) Where the Action is grounded on the Contract, if the Party mistakes the Sum, he fails in his Action, as for Instance, if he declare for an House of 20l. and the Evidence is, that the House was sold for 10l. or for twenty Marks, in such Case the Plaintiff shall not recover, because 'tis upon another Contract. Variant from the Declaration.

(8.) But 'tis otherwise if the Plaintiff declare upon a Promise in Law, or where the Action is grounded on a Tort, as if an Action of Debt is brought for the Escape of the Husband and Wife, and the Jury find, that the Wife only was in Execution and escaped, the Plaintiff shall have Judgment. 2 Cro. 380. Cro. Eliz. 147. Moor 466. Sid. 5. 2 Vent. 151, 223.

(9.) Case, &c. in which the Plaintiff declared, that the Defendant was indebted to W. R. in 40l. who became a Bankrupt, and that the Commissioners assigned Debita in quadem Schedula annex' continen' præd' summam 40l. to the Plaintiff, whereby the Defendant became indebted to the Plaintiff in 40l. and being so indebted, promised to pay, and upon the Evidence the Jury found the Defendant was indebted to the Bankrupt in 30l. only, so that the Sum of 40l. for which the Plaintiff had declared, was never assigned to him, nor promised to be paid; but adjudged, that it was no worse in the Plaintiff than if the Bankrupt himself, before he became Bankrupt, had brought the Action; and the Allen 28. Baker's *Case.*

the Difference is between an Action on a Promise in Law as in the principal Case, and an Action brought upon the Contract it self; for in the first Case, a Mistake in the Sum doth not hurt, but in the other Case it doth.

Where Part of the Issue is only found, and finding, but not pursuant to the Issue. 1 Inst. 227. Cro. Eliz. 133. Dyer 75. Allen 31.

(10.) A Verdict, which finds Part only of the Issue, is void as to the Whole, as for Instance, an Information was brought for intruding into one Messuage and an Acre of Land, and the Jury found the Defendant Not guilty as to the Land, and said nothing of the Messuage, this was adjudged ill as to the Whole.

(11.) Case, &c. for saying the Plaintiff had the French Fox, and that he was, &c. the Jury find all the Words in the Declaration, except those, That he had the French Pox, adjudged ill for that Reason.

Sid. 99.

(12.) So where the Defendant was indicted for a forcible Entry and Detainer, the Jury found the Entry peaceable, but said nothing as to the Detainer; but if they had found the Entry peaceable, and the Detainer by Force, it had been good.

(13.) But where the Defendant was indicted for forging and publishing, and he was found guilty de transgressione, and of the Forgery aforesaid, tho' nothing was said of the Publishing, yet the Verdict is good, because the Word de transgressione prædict' includes it.

2 Lev. 111. Rex v. Norton.

(14.) So in Trespass for an Assault and Battery, and the Jury found the Defendant guilty de transgressione, and Assault, and said nothing as to the Battery, adjudged good, for the Word Transgressio includes the Battery.

Sid. 234.

(15.) Action of the Case for Words, upon Not guilty pleaded, the Jury found that the Defendant non locutus est verba, &c. adjudged ill.

(16.) So in Trespass, upon Not guilty pleaded, the Jury found, that the Plaintiff non damnificatus fuit, this is ill, because it doth not answer the Plaintiff's Charge.

Yel. 78, 79.

(17.) So in Assumpsit, and Non Assumpsit pleaded, the Jury found, that the Plaintiff was damnified 10 l. by the Defendant's Non-performing his Promise; this is ill, because it doth not directly Answer the Issue, but by Implication.

1 Roll. Rep. 257. Baugh's *Case*.

(18.) So if the Issue be solvit ad diem, &c. and the Jury find quod debet, 'tis ill.

(19.) The Defendant pleaded plene Administravit, and the Jury found that he had Goods in his Hands, but did not find to what Value, adjudged ill; because the Plaintiff must recover according to the Value of the Assets found; but if Action of Debt is brought against an Heir, and he pleads Reins per Descent, and the Jury find that Lands in Fee descended to him, but not to what Value, the Verdict is good, because a General Judgment shall be given, and not according to the Value of the Land.

Incertain and imperfect, and where more or less is found. 1 Roll. Rep. 274. Evett's *Case*.

(20.) Trespass against Husband and Wife, in which the Plaintiff inter alia declared, that they beat his Mare: Upon Not guilty pleaded, the Jury found, that the Wife did beat the Mare, and as to the Residue, &c. they found for the Defendant; adjudged, that this was an imperfect Verdict as to the Husband, for it neither acquits or condems him, for the Finding as to the Residue, extends only to the other Trespasses.

Yelv. 106.

(21.) A Verdict found, that W. R. the Copyholder did bargain and sell to the Lord of the Manor, all the Lands which he purchased of W. W. and did not find what Lands, or that they were purchased of W. W. and for that Reason adjudged ill.

Jones 42. Blenerhasset's *Case*.

(22.) In Trespass, the Defendant pleaded a Custom, &c. which being traversed by the Plaintiff, the Jury found the Custom Specially, but Variant from that which was pleaded, concluding their Verdict, quod, si super totam materiam, &c. they find the Defendant guilty, si aliter, &c. then they find him Not guilty. Et per Curiam, a Venire facias De novo was awarded, because there was no Verdict found upon this Issue, there being no Conclusion upon the Point in Issue.

Cro. 37 Eliz. 415. Borastion's *Case*.

(23.) In a Quare Impedit a Special Verdict found an Instrument under the Seal of the Bishop with this Indorsement (viz) A Resignation was acknowledged and accepted by the Bishop; adjudged this was not a Finding a Resignation in Fact, but only Evidence of a Resignation; so if instead of Finding a Feoffment the Jury should find there was a Charter and Livery indorsed; 'tis ill.

Noy 147. *Smith* v. *Fowkes*.

(24.) A Verdict, which finds more than is in Issue, is void quoad that, because 'tis not within the Charge or Commission of the Jury; as for Instance, if a Man bring an Action of Debt,

Where a Verdict finds more than in Issue, 'tis void.

Debt, and declares for 20l. and the Jury, upon nil debet pleaded, find, that the Defendant owed 40l. this is ill, for the Plaintiff cannot recover more than he demands, and in this Case he cannot recover what he demands, because the Court cannot sever their Judgment from the Verdict.

3 Lev. 55. (25.) In Trespass for taking his Gown and Manteau a Special Verdict found, that the Defendant as Constable took the Gown for a Tax, but found nothing as to the Manteau; per Curiam, this is a Discontinuance as to the whole.

Hard. 166. (26.) Assault and Battery by Husband and Wife; Upon Not guilty pleaded, the Jury found, that the Defendant was guilty as to Beating the Wife, and nothing was said of the Husband. Et per Curiam, This Verdict is void, because only Part of the Issue was found.

Sid. 357. (27.) In an Action of Debt for Rent, the Defendant pleaded, nil debet modo & forma prout, as the Plaintiff had declared, upon which they were at Issue, and the Verdict found, quod nil debet modo & forma, as the Plaintiff had declared; and upon a Writ of Error brought, this was assigned for Error, to make the whole Verdict void, for the Plaintiff did not declare, that Nil debet modo & forma, &c. he declared, Quod debet. But per Curiam, the modo & forma, and what follows, shall be rejected, and so nil debet shall stand alone, to make the Verdict good.

Vicar and Vicarage.

(1.) AT Common Law the Vicar had no Freehold, and so it continued till 9 Ed. 3. which gave him a juris utrum, and therefore it hath been held, that Lands might be given by the Rector to the Vicar, because the Freehold still continued in the Rector; but a Stranger could not give Lands to the Vicar, because in such Case he would have a Freehold, and that would be in Mortmain. Vicar, where he had no Freehold.

(2.) And as to this Matter there is a remarkable Case, Anno 40 Ed. 3. 29, 30. ff. A Vicar brought a juris utrum of a Carve of Lands, to try whether it was the Freehold of the Vicar, or the Lay Fee of the Prior, the Defendant pleaded, that he was Parson of the Vicarage, and prayed Judgment if the Court would take Cognisance of this Matter; and it was objected, that the Vicarage being derived out of the Rectory, and that by the Act and Concurrence of the Ordinary; and it being a Thing so far depending on the Ordinary, that he might either decrease the Vicarage and add to the Rectory, or decrease the Rectory and add to the Vicarage, that the Endowment of the Vicarage and how much belonged to it was a Spiritual Thing, and belonged to the Ordinary; that one Parson cannot give to another Parson without Licence. Sed per Curiam, the Thing in Demand is a Matter of Freehold, which cannot be tried by the Ordinary, especially, there being a Warranty and the Act of a Stranger in the Case; 'tis true, heretofore it was held, that a Vicar could not maintain an Action against the Rector, but that was when the Vicar had no certain Estate in his Possessions; but now the Law is altered, for the Vicar is endowed to him and his Successors in Severalty, which is a fixed Estate, and therefore he may maintain an Assise against the Rector, as well as against a Stranger; and it may be that the Lands in Question were not derived from the Rectory, and assigned by the Ordinary to the Vicarage, but given and annexed to it by a Lay Stranger. Vicarage endowed.

(3.) As concerning a Rectory, 'tis an aggregate Inheritance, and must consist of Lands as well as Tithes, there must be the Church and Churchyard at least, and therefore where the Plaintiff declares of a Rectory, he must prove more than Tithes; but yet a Rectory may be without Glebe, for the Rector may have conveyed What is a Rectory. 2 Leon. 10, 11. Sid. 91. *contra.*

veyed away his Glebe, and there are many Compositions between the Rector or Vicar, by which all the Tithes and Glebe are conveyed to the Vicar, reserving only a Rent to the Parson, and the Glebe originally considered was only an Additament ex dono fundatoris, and the Common Law upon the Creation of a Parson, gives him nothing but the Tithes.

What is the Glebe.

Smith *versus* Waller. Trin. 12 Will. III. B. R.

Vicar is endowed out of the Rectory. Vent. 15.

(4.) Where the Vicar is endowed, and comes in by Institution and Induction, he hath curam animarum actualiter, and is not to be removed at the Pleasure of the Rector, who in this Case hath only curam animarum habitualiter; but where the Vicar is not endowed nor comes in by Institution and Induction, the Rector hath curam animarum actualiter, and may remove the Vicar at pleasure; and where a Vicar is endowed, 'tis always out of the Rectory, and by the Act of the Ordinary; therefore where the Question is, whether it be a Vicarage or not, it shall be tried in the Spiritual Court, because it could not begin or be created but by the Ordinary, and with his Concurrence, and so 'tis of an Appropriation.

Lutten *versus* King.

Libel by a Vicar to have his Vicarage augmented. *See 1. Vern. 247.*

(5.) Before the Statute 31 H. 8. a Vicar might libel in the Spiritual Court for an Augmentation of his Vicarage; for upon the Creation of Vicarages, that Power was commonly reserved, and where it was not reserved the Bishop could not augment them, and Libels for that Purpose were frequently exhibited against Impropriators; but now since by that Statute Impropriations are made Lay Fees, the Ordinary cannot intermeddle, neither could they have sued for Tithes in the Spiritual Court, if that Power was not particularly saved to them by the Statute: But there seems to be a Difference where a Vicar sues a Lay Impropriator, and where the Impropriator is a Spiritual Person, for in the last Case 'tis probable he may sue for an Augmentation; and in some Cases, where the Impropriation is not a Lay Fee, as in the Case of the Choristers of Salisbury, where the Appropriation of a Parsonage was made to them before the Statute, and continues so still, and in such Case the Bishop may make an Augmentation, if that Power is reserved, for the Persons are subject to his Command.

(6.) A Vicar libelled for Tithes of Wood, the Defendant suggested for a Prohibition, that Time out of Mind they had paid no small Tithes to the Vicar, but that by the Custom of the Parish they were paid to the Parson: Per Curiam, if the Endowment of the Vicarage is lost, the Tithes must be paid according to Custom.

1 Mod. 50. Where the Endowment is lost, the Tithes must be paid according to Custom.

Visitation and Visitor.

(1.) PRoxies or Procuracies, so called by the Canonists, because upon every Visitation by the Bishop, the Parson or Church visited were to procure necessary Provisions for the Visitor, and this Provision was originally in esculentis & poculentis, but as our Socage, which was so many Days plowing the Lord's Land, came in Time to be converted into certain Payments of Money, so this Provision was changed into a certain Sum of Money paid to the Ordinary, as being de jure Visitor of all Churches within his Diocese; and being thus settled, it was paid and became due, whether there was actually any Visitation, or not, as that Rent, which the Tenant was to pay in Lieu of his Socage Service, came in Time to be due and demandable, whether the Lord had Demesnes to plough, or not.

What are Procurations.

(2.) These Proxies are now Part of the settled Revenue of the Bishop's See, the King himself pays them for his Appropriations, as the Abbeys did before the Dissolution, when they had appropriated Churches.

Procurations are Part of the Bishop's Revenue.

(3.) The Commissary, at his Court of Visitation, cannot cite Lay Parishioners, unless only Church-wardens and Sidesmen, and to these he may give his Articles, and inquire by them.

Noy 123.

(4.) The Archbishop of Canterbury never visits the Diocese of London, this is by Agreement between them; and in Consideration thereof, if a Cause arises within the Diocese of London, and the Suit is brought in the Arches before the Archbishop, tho' this is per Saltum, yet the Bishop of London is to allow it.

1 Cro. 340. The Archbishop never Visits the Diocese of *London*.

Of Visitors of Lay Foundations.

(5.) As to Visitors of Lay Foundations, they are either by Appointment of the Founder, or by Implication of Law, those which are by Appointment, are such to whom the Founder delegates that Power.

The Founder and his Heirs are Visitors.

(6.) By Implication of Law, the Founder and his Heirs are Visitors, if no particular Person is appointed; and this is a Reservation the Law makes to him in Lieu of the Land which he parted withal; and as the Foundation is a Creature of his own, so 'tis reasonable, that it should be visited by his Heirs, to see that the Charity of their Ancestor is not perverted.

(7.) Corporations aggregate and instituted for private Charity, if they are Lay, they are visitable by the Founder, or by whom he appoints, and from the Sentence of such Visitor there lies no Appeal.

(8.) But if Spiritual, 'tis visitable by the Ordinary, and from his Sentence an Appeal lies. Show. 46. Quære.

VISNE.

Wilson *versus* Laws. Pasch. 6 Will. III. B. R.

1 Salk. 1 Roll. Rep. 28. Moor 559. 3 Cro. 282, 898. 2 Inst. 319.

(1.) IN an Appeal of Murder, it was objected, that the Fact was laid in the Parish of St. Giles in the Fields, when it should be in the Vill, as it ought to be in the Statute of Gloucester: Sed non allocatur, for the Parish shall be intended a Vill, and there is no Difference between a Parish and a Vill; 'tis true, a Parish may contain more Vills than one, but that shall not be intended, unless shewn.

Booth *versus* Johnson. Hill. 1 Annæ.

(2.) Where the Plaintiff in his Declaration lays the Visne in Gray's-Inn or Whitehall, which are no Vills, yet after a Verdict or Demurrer they shall be intended to be Vills, and therefore, if the Defendant will take any Advantage, he must plead no such Vill as Gray's-Inn, &c.

Where a Place which is no Vill shall be intended to be a Vill, after a Demurrer or Verdict.

The Queen versus Inhabitants of Wilts. Trin. 3 Annæ.

(3.) In an Information against the County of Wilts, for not repairing Laycock Bridge, the Court held that the Attorney-General might take a Venire facias to any adjacent County; and that it might be de corpore of the Whole, or de Vicineto of some particular Place therein next adjoining.

Way *versus* Gally. Trin. 3 Annæ, B. R.

(4.) The Lessor brought an Action of Debt against the Lessee for Rent, upon a Demise of Lands in Jamaica, and laid his Action in London; the Defendant pleaded, that the Lands were in Jamaica, and that there are Courts there, &c. adjudged upon Demurrer that this Plea is ill; but if in any Action laid here, a local Issue should arise (as suppose in Ireland) it may be tried in the County where the Action is laid, according to * Dowdale's Case, or a Suggestion may be entered on the Roll, that such a Place in such a County lies next to Ireland, and so have a Jury from thence.

Mod. Cases 194. 2 Salk. 651.

* 6 Rep. 46.

Anonymus.

(5.) Ruled, that the Want of a Venue is only curable by such a Plea which admits the Fact for the Trial whereof it was necessary to lay a Venue: The Plaintiff declared on a Bond, and laid no Venue, the Defendant pleads a Release, now by this Plea the Want of a Venue is cured; aliter if he had demurred; quære, if he had pleaded Non est factum.

Where the Want of a Venue is cured.

UNION.

Tho' by an Union both Churches are one Parish, yet as to Taxes and Repairs they are several.

(1.) By an Union, both Churches become one, and one Parish, one Benefice and one Advowson, but as to Taxes and Repairs, they are several, for otherwise it might be prejudicial, because the old Church may be less in Proportion than the New, to which 'tis united.

Who may make an Union.

(2.) Where the Churches are poor and void, the Patron and Ordinary might make an Union without the King, but not if they were rich; for an Advowson lying in Tenure, the King hath a Possibility of an Escheat, Lapse, &c. which could not be lost without his Consent.

(3.) If the Church is full, then both Parson, Patron, and Ordinary must consent to an Union.

3 Cro. 719.

(4.) In a Quare Impedit, the Defendant pleaded a Dispensation for two Benefices, and upon Oyer of the Letters Patents of Dispensation, it was thus:

The Form of an Union.

(5.) ff. It took Notice, that there were two Benefices, and of small Value, therefore Unimus, incorporamus & anneximus the one to the other, for the Life of W. R. the present Incumbent; it was objected, that here were no Words of Dispensation, and therefore this Clause cannot enure as a Dispensation, neither can it be an Union, because 'tis done by the King alone, without the Concurrence of the Patron and Ordinary: Sed per Curiam, tho' there cannot be a perpetual Union without such Concurrence, because 'tis a Loss both to Patron and Ordinary, yet there may be a temporary Union, as in this Case, for the Life of the Incumbent, and this might be done by the Metropolitan alone; for after the Death of the Incumbent, the Union is dissolved, and no less accrews, either to the Patron or Ordinary in the mean Time, for the one hath his Presentation and the other his Admission, and this is a compleat Dispensation, and allowed by the Statute 31 & 37 H. 8. cap. 21. (viz.) Any License, Union, or Dispensation to the contrary.

UNIVERSITIES.

(1.) OCtoginta Damæ apud actum Oxford' dat' cla. 19 Ed. 1. Memb. 6. v. 3.

(2.) Strata Civitatis mandat' per breve Regis emendari per Burgenſes Oxon' & quod porcuaria deſtruantur. Clauſ. 29 Ed. 1. Memb. 14. D. 2.

(3.) Breve Regis ne juſta & alia facta armorum fiant prope Oxon' ne quies Scholar' impediatur. Clauſ. 33 Ed. 1 Memb. 2. D. 1. Memb. 3. v. 2.

(4.) Breve Majori & ballivis Oxon' de Aſſiſa panis & vini obſervand' & de rationabili precio ſuper victualia imponend' ſicut per Juramentum Cancellario & Procuratoribus aſtringuntur. Clauſ. 3 Ed. 1. Memb. 18. D. 2.

(5.) The Univerſity of Oxford hath Jurisdiction in all Treſpaſſes, Injuries, Quarrels, Crimes and Matters whatſoever which do not concern Life or Freehold. — Where they have Juriſdiction, and where not.

(6.) But an Ejectment for the Right of a Chattel real; as for Inſtance, of a Leaſe for Years ſhall not be determined there, for tho' a Freehold is not recovered, yet the Land is drawn from him who perhaps might have the Freehold.

(7.) Neither have they any Jurisdiction, unleſs the Plaintiff or Defendant be a Scholar or Servant of the Univerſity, or of ſome College, but if either of them is a Scholar, 'tis then a Matter within their Jurisdiction; but yet, if either of them is entred into a College by a Trick to avoid a Suit in B. R. or to excuſe himſelf from Town Offices, their Privilege ſhall not be allowed. — Cro. Car. 73, 88. 2 Vent. 106.

(8.) The Univerſity demanded Conuſance of a Suit brought in the Exchequer by Quo minus, and it was allowed. — Hardr. 505.

(9.) Debt againſt the Defendant, a Townſman in Oxford, for refuſing to execute an Office in the Corporation: It was moved, that he being a Servant to Dr. Iriſh, might have the Privilege of the Univerſity, and a Charter was produced by which it was — 2 Vent. 106.

was granted, that the Members and Servants of the Univerſity ſhould be ſued in the Vicechancellor's Court, and not elſewhere; and a Certificate from the Chancellor, directed to the Chief Juſtice, that the Defendant was matriculated and regiſtred in the Univerſity; but it appearing to the Court, that this was done two Days, and no more, before he was choſen to this Office, and that he was a Painter by Trade, and had lived ſeveral Years in the Corporation, and no Servant attending Dr. Iriſh, the Privilege of the Univerſity was not allowed.

USES.

(1.) USES were not at Common Law, neither were they ever mentioned till the Reign of R. 2. and therefore there is no Remedy at Law for them.

1 Rep. 126, 129, 187, 133. (2.) But yet the Eſtate and Limitation of an Uſe ought to be governed and directed by the Rules of Common Law; and there is no Difference between Eſtates conveyed by Way of Uſe and by Way of Poſſeſſion.

(3.) Where a Man intends to paſs an Eſtate at and by a Common Law Conveyance, it ſhall never take Effect as a Covenant to ſtand ſeiſed, or as a Conveyance upon the Statute of Uſes.

1 Inſt. 49. (4.) As for Inſtance, if by Deed I give, grant and enfeoff my Son, &c. with a Letter of Attorney to make Livery, this ſhall not enure as a Covenant to ſtand ſeiſed; but it might have been otherwiſe, if there had been no Letter of Attorney in the Deed.

See *Samms* v. *Jones*. (5.) The Father being ſeiſed of a Reverſion, granted and confirmed the ſame to his Son, to the Uſe of himſelf for Life, Remainder to his Son, without any Attornment, this Conveyance is void; yet if there had been no Limitation of the Uſe, this Deed might have enured as a Covenant to ſtand ſeiſed.

See *Hore* v. *Dix*. (6.) So where by Deed between the Father and Son of the one Part, and W. R. of the other Part; the Father did give, grant

and enfeoff W. R. to the Uſe of his Son, there being no Livery, this is a void Conveyance.

(7.) Now as to Conſiderations to raiſe an Uſe, the Caſes are, if the Conveyance is by Way of Covenant, the Conſideration muſt be either natural Affection or Marriage.

(8.) If 'tis by Bargain and Sale, then the Conſideration muſt be Money.

(9.) Therefore a Covenant to ſtand ſeiſed to the Uſe of his Son and his Wife, whom he ſhall marry, this is good.

(10.) But a Covenant to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder over, with a Power to let Leaſes for forty Years to Perſons who are Strangers; this is not good as to the Strangers, becauſe they are not privy to the Conſideration; but if it had been to make Leaſes to any of his Children or Kindred, it had been good.

(11.) So a Covenant to ſtand ſeiſed to the Uſe of A. and B. and C. his Brother, this is good as to the Brother, and it is entirely in him, but void as to the other two, becauſe not privy to the Conſideration. 1 Cro. 530.

(12.) In a Covenant to ſtand ſeiſed, the Word Covenant is but declaratory; therefore, if the Father by Deed ſets forth, that he ſtands ſeiſed to the Uſe of his Son, and doth not covenant to ſtand ſeiſed, yet 'tis a good Covenant.

(13.) So if by Deed the Father grants his Lands to his Son in Tail, this is a good Covenant to ſtand ſeiſed. See Buckley v. Simonds.

(14.) For if the Word Covenant was obligatory, the Deed ſhould not enure as a Covenant to ſtand ſeiſed.

(15.) Therefore if the Father covenants, that his Lands ſhall go, remain and deſcend to his Son after his Deceaſe, or that he will convey to his Son, this is not a Covenant to ſtand ſeiſed, for 'tis only obligatory to a future Thing.

(16.) But if the Father covenants to ſtand ſeiſed to the Uſe of the Son, and to do any Act for farther Aſſurance, or to levy a Fine to the Uſe of his Son in Tail, and that if not levied before ſuch a Time, that then he will ſtand ſeiſed to his Uſe, this ſhall enure as a Covenant to ſtand ſeiſed.

(17.) It has been already ſaid, that there were no ſuch Things, as Uſes at Common Law; the Reaſon was, becauſe the Feoffee was always taken as the Owner of the Land, and that it was very inconvenient and abſurd, that there ſhould be two ſeveral Fees, and Owners of the ſame Land ſimul & ſemel, therefore at Common Law the Feoffees to Uſes were the very Tenants, and had a Right to forfeit.

(18.) But the Statute to remedy this Inconvenience hath united the Eſtate to the Uſe; ſo that now the Feoffees to Uſes have no Eſtate or Intereſt at all, but in Reſpect of the contingent Eſtates and Uſes limited in the Deed.

(19.) And this is neither a naked Authority, nor a meer Eſtate which they have, but aliquid medium between the Eſtate and Authority, they have ſcintilla juris and a poſſibilitas uſus emergentis.

(20.) Some Queſtions have been made, out of what an Uſe ſhall ariſe; as for Inſtance, it hath been held, that Uſes ſhall be raiſed only out of a Freehold, that they cannot be raiſed out of a Chattel, becauſe that is in Nature of a Truſt, nor out of an Uſe, nor out of a bare Right, nor out of an intended Purchaſe; as where a Man covenants to ſtand ſeiſed of Lands which he intends to purchaſe, nor out of ſuch Things which ipſo uſu conſumuntur, as Commons, &c.

Moor 509.

(21.) But Rents, Liberties and Franchiſes, and ſuch Local Inheritances, may be granted to Uſe; but not meer perſonal Inheritances, as Annuities.

Dyer 10.

(22.) Where a Feoffment is made without expreſs Uſe or Conſideration, there the Uſe ſhall be in the Feoffor by Implication of Law; but 'tis otherwiſe where a Man makes a Gift in Tail, for there is a Tenure, which is a Conſideration.

Lamplugh *verſus* Shotterell. Paſch. 1 Annæ B. R.

2 Salk. 678. Farr. 71. Where an Uſe ſhall reſult.

(23.) THE Caſe was, a Bargain and Sale was made for a Year in Conſideration of 5 s. paid, and thereupon a Releaſe to the Bargainee and his Heirs, without expreſſing any Conſideration, the Queſtion was, whether the Uſe ſhould reſult to the Bargainor, and it was inſiſted, that it ſhould not, becauſe the Releaſe doth but enlarge the firſt Eſtate, and that is to the

Uſe of the Bargainee, and both are but as one Conveyance, and the 5 s. mentioned in the Leaſe, extends to the Releaſe, and the Quantum of the Conſideration is not material, for a Penny is ſufficient; but on the other Side it was argued, that this Conveyance is in Nature of a Feoffment, upon which an Uſe ſhall reſult to the Feoffor where no Conſideration is expreſſed.

(24.) Holt Ch. Juſt. Before the Statute of * Uſes there might be a Reaſon why an Uſe ſhould reſult upon a Feoffment, for it put the Eſtate out of the Feoffor, and he had only a Truſt left which could not be forfeited; and to this Purpoſe ſuch Feoffments were made, but this cannot be ſince the Statute; for if an Uſe muſt reſult to the Feoffor, and the Eſtate muſt be executed to the Uſe, the Feoffment is in vain, and the Party hath made a Conveyance to no Manner of Purpoſe, being in the ſame Eſtate as he was before he made the Feoffment; and ſo it is of a Leaſe and Releaſe, but it is otherwiſe upon a Fine or Recovery, for they may have their particular Eſtate in other Reſpects, as barring upon Nonclaims or Remainders. * 27 H. 8.

So it is if by Feoffment or by Leaſe and Releaſe, a Man conveys any particular Eſtate mediate or immediate to another Perſon, there the Reſidue of the Eſtate ſhall, by Implication of Law, remain in the Party himſelf; but where no Eſtate is limited to another, there the whole Conveyance is to no Purpoſe, if the Party be conſtrued to have the reſulting Uſe in him.

(25.) In a Special Verdict in Ejectment, the only Point was, whether a Leaſe for a Year, made upon no other Conſideration than the Reſervation of a Pepper-Corn, ſhall operate as a Bargain and Sale, and make the Leſſee capable to take a Releaſe: Et per Curiam, it ſhall, for the Reſervation of a Pepper-Corn is a ſufficient Conſideration to raiſe an Uſe. 1 Mod. 262. 2 Vent. 35. 2 Mod. 249. What is a good Conſideration to raiſe an Uſe.

USURPATION.

(1.) AT Common Law the Patron in Fee was put out of Poſſeſſion by an Uſurpation, and tho' he might recover the Advowſon it ſelf by a Writ of Right, yet he had no Remedy for the Preſentation hac vice, nor if another Avoidance happen, unleſs he brought his Writ of Right, and recontinued the Advowſon.

(2.) If the Patron had the Advowſon in Tail, or for Life, this Turn, and alſo his whole Advowſon was gone.

(3.) If an Uſurpation was made upon Tenant by the Curteſy, or in Dower, or upon a Leſſee for Years, or upon a Biſhop in Time of a Vacancy, neither the Heir or he in Reverſion, or Succeſſor, could preſent at the next Turn, but now this is altered by the Statute, and the Law is,

(4.) That if there be an Uſurpation upon a Patron in Fee, he may bring a Quare Impedit for the preſent Turn, but then it muſt be brought within ſix Months, otherwiſe he is put to his Writ of Right of Advowſon.

(5.) But if he is only Patron for Life, and doth not bring his Quare Impedit within ſix Months, he hath loſt his Advowſon for ever, for his Intereſt is diſcontinued, and he cannot preſent or maintain a Quare Impedit for the next Turn, being out of Poſſeſſion, and a Writ of Right will not lie, therefore the Eſtate in Reverſion is diſcharged of that Intereſt, but he in Reverſion may have a Writ of Right.

(6.) If there is an Uſurpation on a Tenant in Dower, or Tenant by the Curteſy or Guardian, and ſix Months paſs after the particular Eſtates are determined, and the Heir comes of Age, the Heir may maintain a Quare Impedit, or preſent to the next Avoidance; and if he doth not, then he is put to his Writ of Right.

(7.) And ſo it is if the Anceſtor grant the Advowſon for Life or Years, and an Uſurpation is made, the Heir may maintain a Quare Impedit for the next Avoidance, as his Anceſtor might have done; ſo it is of a Succeſſor, for a Reverſion by Deſcent,

and a Succeſſion are within the Statute, but a Reverſion by Purchaſe is not.

(8.) Upon the Statute 1 Eliz. if an Uſurpation be on a Biſhop, it ſhall bind him, becauſe he ſuffered it; but his Succeſſor may preſent to the next Avoidance, or bring a Quare Impedit, tho' he is out of Poſſeſſion. Jones 46.

(9.) An Uſurpation cannot put the King out of Poſſeſſion of his Land, much leſs diveſt an Inheritance out of him, therefore it cannot diveſt the Inheritance of an Advowſon out of him, for nothing can go out of him without a Record, no more than it can come to him.

(10.) But an Uſurpation may diſpoſſeſs him of his Preſentation, (i. e.) it may bind his Poſſeſſion, ſo as he cannot remove the Incumbent, without a Quare Impedit, tho' it cannot ſo diveſt his Eſtate in an Advowſon as to bind his Inheritance and put him to a Writ of Right, &c.

Mugg *verſus* Brown. Paſch. 12 Will. III. B. R.

(11.) IF an Incumbent be in by Uſurpation on the King, and would be confirmed, he muſt not procure a new Preſentation from the King, becauſe that would be void, the Church being full; but he muſt get the King's Letters Patents reciting the whole Matter, and therein granting the Church to him: And per Holt Ch. Juſt. theſe are called Letters Patents ad corroborandum. 1 Salk. 161. Of Letters Patents *ad corroborandum.*

(12.) An Uſurpation upon a Leſſee for Years gains the Fee-ſimple, and puts the true Patron out of Poſſeſſion, and tho' by the Statute of Weſtm. 2. he is in Reverſion after the Determination of the Leaſe for Years, may have a Quare Impedit when the Church is void, or may preſent, and if his Clerk is inſtituted and inducted, then he is remitted to his former Title, yet till that is done, the Uſurper hath the Fee, and the Writ of Right of Advowſon lies againſt him. Hutt. 66. Uſurpation on Leſſee for Years.

(13.) Quare Impedit, the Defendant pleaded an Uſurpation made by the Queen after the Death of the laſt Incumbent, and that her Clerk was admitted, inſtituted and inducted, and was in Poſſeſſion for ſix Months; the Plaintiff replied and ſet forth, that the Patron had brought a Quare Impedit againſt him who was Incumbent upon the Queen's Preſentation, and had Judgment againſt him by Default: And per Curiam, by this Judg- 5 Bulſt. 38.

ment

ment the Patron was remitted to his former Right; but it had been otherwise if the Queen had presented on a Deprivation, for there the Patron must have six Months to present after Notice of the Deprivation.

USURY. *See* Indictment 8.

2 Cro. 677. Cro.Car. 101. Noy 143. 2 Vent. 83. * Noy 133.

(1.) THere must be a corrupt Agreement for more than Statute Interest, otherwise 'tis not Usury, and the Defendant shall not be punished, unless he * receive some Part of the Money in Affirmance of the usurious Agreement, for 'tis the Receipt and not the Contract which makes him punishable.

(2.) Interest upon Bottomry-Bonds, which is fœnus nauticum, or Usura maritima, is not within the Statute.

I. l. Carth. 67. Lombard. 125. 1 Show. 2.

Mason *versus* Abdy. Trin. 1 Will. III. B. R.

What is an usurious Contract.

(3.) THE Obligor was bound in a Bond of 300 l. conditioned to pay 22 l. 10 s. Premium, at the End of the first three Months after the Date, &c. and Six-pence in the Pound at the End of six Months, as a farther Premium, together with the Principal it self, in Case the Obligor be then living, but if he die within that Time, then the Principal to be lost, adjudged this is an usurious Contract, because there was a Possibility that the Obligor might live so long; and there is an express Provision to have the Principal again.

1 Saund. 294. Where *corrupte recepit* is no good Plea.

(4.) Debt upon Bond, dated 24 May, conditioned to pay 300 l. on the 25th Day of February, &c. The Defendant pleaded in Bar, that after the making the said Bond, (viz.) such a Day the Plaintiff corrupte recepit of the Defendant 30 l. for the Use of the said 300 l. for one Year, (viz.) from such a Day to such a Day, which is more than six per Cent. per Annum, contra formam Statuti; and upon a Demurrer to this Plea it was adjudged ill, because the * Statute makes all Bonds void, where Money is * lent upon or for Usury, and where more is taken, than after the Rate of six per Cent. But this Bond doth not appear to be for Money lent upon or for Usury, but for Payment

12 Car. 2. cap. 13. * *Postea* 6. S.P.

of a just Debt, and if there is an Usurious Contract * after the Bond made, that shall not affect the Bond to make it void, because it was good at the Time it was made; but by the later Clause of the Statute such an Usurious Contract is punishable by Forfeiture of treble the Value. * Post. 5. P. S.

(5.) Information was brought upon the same Statute, setting forth, that the Defendant 16 Novemb. 20 Car. 2. lent W. R. 20 l. till June following, which is six Months, and that afterwards, (viz.) Ad finem Termini prædict', he took of the Plaintiff corrupte & extorsive thirty Shillings for the Loan thereof, which is more than allowed by the Statute: Upon Not guilty pleaded, the Jury found for the Informer; but the Judgment was set aside, because it appears, that this corrupt Agreement was made * ad finem Termini, when by the Statute it must be at the Time of the Contract made, and if the Contract is not then Usurious, the Assurance is not void; but the Borrower shall have treble the Value, as forfeited by the Statute. Raym. 196. 1 Mod. 69. * *Antea* 4. S. P.

(6.) Information against the Defendant, for that he on the 30th of May, &c. by Way of Corrupt Contract and Agreement, cepit & ad lucrum suu' convertit 40 s. for deferring the Day of Payment of 25 l. from the 29th of July to the 30th of May (which was the Day on which he took the 40 s. contra formam Statuti, after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that it did not appear by this Information that the 25 l. was Money *lent; but if it had 'tis ill, because the Taking the 40 s. was after the Lending, and there was no corrupt Agreement laid either before or at the Lending. Sed per Curiam, if upon this Information Judgment cannot be given on the Statute to pay treble the Money taken, yet being found, that the Defendant took 40 s. by a corrupt Agreement, Judgment shall be given against him at Common Law, which is Fine and Imprisonment. Sid. 421. Where Judgment cannot be given upon the Statute it shall be given as at Common Law.

(7.) Debt upon Bond conditioned, that in Consideration of 12 l. paid by the Plaintiff to the Defendant, he became bound to pay the said Plaintiff 14 l. if he lived six Months after the Date of the Bond; there was a Plea and Demurrer, and it was objected, that it appears by the very Condition of this Bond, that the Contract was Usurious, it being to pay 14 l. for 12 l. in six Months after the Date of the Bond; 'tis true, this might have made the Bond void, if the Statute had been pleaded, but that not being done, this Objection comes too late. Lutw. *Grange's Case.* Where the Statute was not pleaded, the Bond, tho' Usurious, is good.

(8.) The Distinction in the Books is, that where the Principal and Interest are both in Danger of being lost, there the Contract for extraordinary Interest is not Usurious; but where the Principal is well secured, and the Interest only in Danger, 'tis otherwise. What Contract for extraordinary Interest is good, and what not.

WAY.

Sid. 140. The Jury find, that the Defendants *reparare non debent*, but did not find, who ought to repair.

(1.) Information against the Hundred of Yarnton, for not repairing an Highway, the Defendants pleaded, that non reparare debent, upon which they were at Issue, and tho' it was ill, the Court would not quash it till the Issue was tried, that it might be known who ought to repair, and upon the Trial the Jury found quod reparare non debent; but did not find who ought to repair, and therefore it was insisted, that no Judgment could be given. Sed per Curiam, the Judgment shall be, that the Hundred of Yarnton eat acquieta, and that the other Wills between whom the Issue was, should repair.

1 Vent. 208. Indictment for Stopping a Foot-way to the Church, *ad commune nocumentum*, good.

(2.) Indictment at the Sessions for Stopping Communem viam pedestrem ad Ecclesiam, ad commune nocumentum, &c. it was objected, that an Indictment would not lie for Stopping a Foot-way to the Church, because it was only a Nusance to the Parishioners, and no more than a Private Damage. Sed per Curiam, it being laid ad commune nocumentum, the Church may be the Terminus ad quem, &c. and the Way may lead farther.

1 Vent. 256. 1 Mod. 112. How a Parish must plead if indicted for not repairing.

(3.) Where a Parish is indicted for not repairing a Way, they cannot plead Not guilty, and give in Evidence, that such a Person is bound to repair either by Tenure or Prescription, because the Parish is liable de communi jure; but if they would discharge themselves they must plead the Tenure or Prescription.

Sid. 464. 2 Saund. 160. Where the Defendant was charged *ratione tenuræ*.

(4.) Presentment in the Sessions by one Justice, that the Highway in Stoke Common was out of Repair, and that Sir N. S. ought to repair it ratione tenuræ of certain Lands, Parcel of the said Common, which he had encroached and enclosed from the Highway, and which Time out of Mind had been Parcel of the Highway, and that he did not repair it ad commune nocumentum, &c. This Presentment being removed into B. R. the Defendant pleaded, that the Inhabitants of Stoke ought to repair it, and traversed, that he ought to repair ratione tenuræ; and upon a Demurrer to this Plea it was objected, that it was ill, because the Defendant had not answered the Encroachment, which was the Principal Matter. Sed per Curiam, the Defendant being charged to repair Ratione tenuræ, that is the Cheif Matter to be answered, because if he had been chargeable by Reason of the Encroachment, he ought not to have been charged Ratione tenuræ, for there is a great Difference

ference between the one and the other, because where there is an Encroachment, the Party may lay it open when he will, and then he is no longer chargeable to repair; but where the Charge is Ratione tenuræ, he is still bound to repair, tho' he lay it open to the Highway.

(5.) Upon an Indictment for not repairing a Highway, if the Defendant produce a Certificate before the Trial, that the Way is repaired, he shall be admitted to a Fine; but after a Verdict such Certificate will be too late, for then there must be a Constat to the Sheriff, and he ought to return, that the Way is repaired, because the Verdict being a Record, must be answered by Record.

Raym. 215. Upon an Indictment for not repairing, the Defendant may be admitted to a Fine on a Certificate, that 'tis repaired, but not after a Verdict.

(6.) Case, &c. for Stopping a Way, in which the Plaintiff declared, that he was possessed of an antient Messuage, and had a Foot-way over the Defendant's Ground, as belonging to the said Messuage, & de jure habet, and that the Defendant stopped it: Upon Demurrer to this Declaration it was objected, that it was ill, because the Plaintiff did not prescribe, or otherwise entitle himself to this Way than only by a bare Possession of an House. Sed per Curiam, the Declaration is good, it being no more than a Possessory Action.

2 Vent. 186. Where the Plaintiff declared on his Possession, and held good.

(7.) Indictment was found against the Defendant, for that he vi & armis Part of the Highway, leading from Shoreditch to Stoke, &c. postibus & repagulis incluſit: Upon a Trial at Bar the Chief Question was, whether the Place enclosed was an Highway or not. Et per Hale Ch. Just. a Way leading to any Market-Town, and communicating with any great Road, is an Highway; but if it lead only to a Church, or to a House or Village, or to some particular Close, 'tis a Private Way; and that the Parish of Common Right is to repair the Highway, unless particular Persons are obliged by Custom or Prescription, but private Ways are to be repaired by the Village or Hamlet, and sometimes by a particular Person.

1 Vent. 189. What is an Highway, and what not.

WILLS.

Fiſher *verſus* Nicholls. Hill. 12 Will. III. B. R.

Wills are more favourably conſtrued than any other Deed.

(1.) IN this Caſe it was ſaid by Holt Ch. Juſt. That in Wills the Conſtruction is more favourable to fulfil the Intent of the Teſtator, than 'tis in Deeds or other Conveyances executed by him in his Life-time; therefore where there is a Gift by Will to W. R. and his Aſſigns for ever, this is an Eſtate in Fee; but if by Deed, 'tis no more than an Eſtate for Life; ſo if a Gift to W. R. and his Heirs Male, by Will, is an Eſtate-tail, but by a Deed, 'tis a Fee-ſimple; ſo a Deviſe to his eldeſt Son and his Heirs, after the Death of the Wife of the Teſtator, is an Eſtate for Life to the Wife by Implication, but 'tis not ſo in a Deed; the Reaſon of this Difference is not becauſe the Teſtator is inops Concilii, but becauſe a Will is not a Common Law Conveyance; but by the Statute, 'tis true, there were Wills before the Statute of H. 7. but thoſe were not by Common Law, but by Cuſtom, as in Caſe of Burgage Lands: Now as Cuſtom enabled Men to diſpoſe their Lands in this Manner by their Wills, and not according to the Rules and Forms in Common Law Conveyances, ſo it exempted this Kind of Conveyance from the Regularity and Propriety requiſite in thoſe Conveyances; and by this Means it came to paſs, that Wills by the Statute in Imitation of thoſe by Cuſtom, gained ſuch favourable Conſtructions.

By the Statute 29 Car. 2. Cap. 3. there is a conſiderable Alteration made in the Law relating to Wills in Writing; for by that Statute it is enacted, that the Will muſt be Written in the Life-time of the Teſtator, and ſigned by him, or by ſome other Perſon in his Preſence, and by his Direction; and that the Witneſſes ſhall ſubſcribe their Names in his Preſence.

Wit-

Witneſſes to Wills.

Davy *and* Nicholas *verſus* Ann Smith. Paſch. 5 Will. III. B. R.

(1.) UPON a Trial at Bar, the Queſtion was, whether the Witneſſes to a Will had purſued the Directions of the Statute of * Frauds, &c. in ſubſcribing their Names; and it was reſolved, that where the Teſtator lay in a Bed in one Room, and the Witneſſes went thro' a ſmall Paſſage into another Room, and there ſet their Names at a Table in the Middle of the Room, and oppoſite to the Door, and both that, and the Door of the Room where the Teſtator lay, were open, ſo that he might ſee them ſubſcribe their Names if he would; and tho' there was no poſitive Proof that he did ſee them ſubſcribe, yet that was a ſufficient Subſcribing within the Meaning of the Statute, becauſe it was poſſible that the Teſtator might ſee them ſubſcribe; and therefore, per Curiam, if the Witneſſes ſubſcribe their Names in the ſame Room where the Teſtator lies, tho' the Curtains of the Bed are drawn Cloſe, 'tis a good Subſcribing within this Statute; becauſe, if 'tis in his Power to ſee them, and what is done, it ſhall be conſtrued to be in his Preſence.

What ſhall be a ſufficient Subſcribing in the Preſence of the Teſtator. 29 Car. 2. cap. 3.

Lea *verſus* Libb. 1 Will. III. B. R.

(2.) THE Teſtator made his Will in Writing, ſubſcribed by Two Witneſſes, and deviſed all his Lands to W. R. afterwards he made a Codicil, in which his Will was recited; and this alſo was atteſted by Two Witneſſes, one of which Witneſſes was a Witneſs to the Will, but the other was a new Witneſs; the Queſtion was, whether this new Witneſs ſhould make a Third to the Will, the Statute requiring that there ſhould be Three; and adjudged that he ſhould not; 'tis true, here are three Witneſſes to the Intent and Will of the Teſtator, but there are but Two to his Will in Writing; 'tis true likewiſe, that there are two Witneſſes to the Codicil, but thoſe are not Witneſſes to the written Will, ſo that there wants one Witneſs to the Will in Writing.

Show. 68. 3 Mod. 262. Where Two Witneſſes to a Will, and one to a Codicil, doth not make Three Witneſſes to that Will.

Witneſſes to Wills.

(1.) By the Canon Law, and ſo likewiſe by our Law, Two Witneſſes are requiſite to prove a Will for Goods, and three for Lands; but now by the * Statute 'tis required, that theſe Witneſſes ſhould ſubſcribe their Names in the Preſence of the Teſtator; and ſince the Making that Statute there have been ſome remarkable Caſes, both as to the Manner and Number of the Witneſſes ſubſcribing.

* 29 Car. 2. cap. 3.

(2.) And firſt, as to the Manner of Subſcribing: ſ. The Caſe was, there were Three Witneſſes, but they did not ſubſcribe their Names at the ſame Time, but ſeverally, at the Requeſt of the Teſtator, and at ſeveral Times, and were not all preſent at one and the ſame Time, this was decreed a good Will.

2 Ch. Rep. 109. Where the Witneſſes ſubſcribe at ſeveral Times, 'tis good.

(3.) Then, as to the Number of Witneſſes, ſee the Caſe of * Lea and Libb laſt mentioned, and this Caſe: ſ. The Teſtatrix made a Will in Writing, according to the Statute, by which ſhe deviſed her Lands to one Petit, and afterwards by another Will ſhe deviſed the ſame Lands to the ſame Perſon, and died, but this ſecond Will was defective in the Circumſtances of the Witneſſes ſubſcribing their Names in her Preſence, which they did not, and the Will was held void for that Reaſon, and by Conſequence no Revocation of the firſt Will, for that muſt be by a Writing operating as a Will, or by a Writing by which the Teſtator declares his Intention to revoke the firſt Will.

* *Antea* 2. Where the Revocation muſt be by a Writing operating as a Will, or declaring an Intention to revoke.

Writs, and Writs of Error, of the Teſte and Return, &c.

Maſon *verſus* March. Trin. 11 Will. III.

No Averment againſt the Teſte of a Writ, when 'tis in Support of Juſtice.

(1.) IN falſe Impriſonment laid to be in the Vacation, if the Defendant plead a Writ taken out Teſte in the Term, per quod he took the Plaintiff, he (the Plaintiff) may reply, that notwithſtanding the Teſte of the Writ, he took it out in Vacation-Time; for where the Teſte of the Writ is in Support of Juſtice, no Averment ſhall be made againſt it: But per Holt Ch. Juſt. 'tis otherwiſe where 'tis to juſtify a Wrong.

2 Vent. 261. 2 Lev. 397. Debt lies on a Judgment after a Writ of Error brought.

(2.) The Plaintiff obtained a Judgment, and after a Writ of Error brought, he, (viz.) the Plaintiff, brought an Action of Debt on that Judgment, the Defendant ſuppoſing it was ſuſpended by the Writ of Error, demurred to the Declaration: Sed per Curiam, he can have no Advantage of this Matter upon a Demurrer, he ought to have pleaded it ſpecially, and to pray Judgment if he ſhould be compelled to anſwer pending the Writ of Error.

Raym. 231. Where Error is well aſſigned, there a Plea *in nullo eſt Erratum* is a Confeſſion of the Fact.

(3.) In a Writ of Error to reverſe a Fine, Infancy was aſſigned for Error, and a Scire facias iſſued againſt the Tertenants and Cogniſee, who plead in nullo eſt Erratum: Et per Hale Ch. Juſt. where Error is well aſſigned (as 'tis in this Caſe) there in nullo eſt Erratum amounts to the Confeſſion of the Fact, but where the Error is not well aſſigned, there in nullo eſt Erratum amounts to a Demurrer; now in the principal Caſe the Infancy was well aſſigned as an Error in Fact, therefore the Defendants ought not to have pleaded in nullo eſt Erratum, but they ought to have pleaded to Iſſue upon the Scire facias.

Raym. 381. Appeals and Writs of Error ſtand good after the Parliament is diſſolved.

(4.) Reſolved by the Lords Spiritual and Temporal, that Caſes of Appeals and Writs of Error ſhall continue, and are to be proceeded on in ſtatu quo, &c. as they ſtood at the Diſſolution of the laſt Parliament, without Beginning again de novo; and like-

likewise, that the Diſſolution of the laſt Parliament doth not alter the State of Impeachments brought by the Commons in that Parliament.

WRIT of ERROR.

Collins *verſus* Scevington. Hill. 9 Will. III. C. B.

Where a Writ of Error is no *Superſedeas.*

(1.) THE Plaintiff obtained a Judgment for 10 l. the Defendant brought a Writ of Error, ſuppoſing the Judgment to be for 20 l. adjudged this was no Superſedeas, for Executions are favoured in Law as the Fruits of Men's Actions, and therefore ſhall not be delayed without apparent Cauſe, which was not in this Caſe, becauſe this could not be a Writ of Error upon that Judgment.

Witty *verſus* Polehampton. Mich. 10 Will. III. B. R.

Where the Judgment is not ſuſpended by the Writ of Error.

(2.) W. R. gave a Warrant of Attorney to confeſs a Judgment to W. W. as of Trinity-Term, and afterwards to hang up that Judgment, he brought a Writ of Error, Teſte 27 June, returnable 12 July following; W. W. the Judgment-Creditor having Notice of this Matter, entered up the Judgment as of the laſt Day of that Trinity-Term, ſo that the Writ of Error was returnable before the Judgment was ſigned; and upon a Complaint to the Court of this Matter, they would do nothing in it, for if it was a Trick, it was an honeſt one, and to obtain a juſt Debt: So per Curiam, this Judgment is not ſuſpended by this Writ of Error; aliter if the Return had been after.

Carlton *verſus* Mortaugh. Hill. 2 Annæ.

(3.) WRIT of Error was brought in B. R. upon a Judgment in C. B. and the Plaintiff in Error aſſigned the Want of an Original for Error; the Defendant in Error pleaded a Releaſe of all Errors, but laid no Venue, where the Releaſe was made, for which Cauſe the Plaintiff demurred to the Plea, and in arguing this Demurrer it was admitted, that the Plaintiff could not pray a Certiorari to certify whether there was any Original or not, becauſe the Defendant by his Plea had confeſſed, that there was none, the Fault being cured by the Releaſe of Errors, and therefore it was doubted whether the Court could award a Certiorari, and without it they could not reverſe the Judgment; for where the Plaintiff in Error aſſigns a good one, and the Defendant pleads an ill Bar, upon which there is a Demurrer, the Court muſt reverſe the Judgment, becauſe the Error is confeſſed and admitted. Et per Holt, Ch. Juſt. where a Releaſe of Errors is pleaded by the Defendant, and upon Iſſue joined 'tis found for the Plaintiff, the Court cannot reverſe the Judgment.

1 Salk. 268. Where the Plaintiff cannot have a *Certiorari* to certify whether any Original, or not.

VVrit of Enquiry.

Pagett *verſus* Preſton:

(1.) CASE in which the Plaintiff declared upon an Indebitatus Aſſumpſit, and alſo on a Bill of Exchange; the Defendant quoad the Bill of Exchange demurred, and ſaid nothing as to the Indebitatus Aſſumpſit, thinking thereby to make a Diſcontinuance, if the Plaintiff did not take Judgment by nil dicit, which he omitted, and only joined in Demurrer; afterwards, when the Paper-Book was made up in the Office, the Clerk of the Papers left out theſe Words, quoad Billam Excambii, and the Cauſe being put in the Paper Judgment was given for the Plaintiff, and

Where a Judgment ſhall not be ſet aſide after a Writ of Enquiry executed.

and a Writ of Enquiry was executed; and now upon a Motion to set aside this Judgment for Irregularity, by omitting these Words, quoad Billam Excambii, Holt Ch. Just. said they came too late, for they should have taken Notice of it when it came into the Paper-Office, and not stay till a Writ of Enquiry was executed; 'tis a Trick, for the Defendant concluded, that the Plaintiff would not take Notice of it on a Demurrer, being a Thing of Course; therefore the Judgment was confirmed.

East *versus* Estington. Mich. 1 Annæ B. R.

1 Salk. 130. (2.) IN this Case it was held, that in all Superior Courts the Judge sends his Precept to the Sheriff to enquire of Damages; but in London in all Inferior Courts an Enquest is summoned in Court, and the Court takes the Inquisition of Damages.

1 Lev. 255. Where the imperfect Finding by a Jury shall not be supplied by a Writ of Enquiry.

(3.) In Replevin, the Defendant avowed for Rent Arrear, the Plaintiff replied Non concessit, &c. upon which they were at Issue, and the Jury found the Value of the Cattle taken, but did not find what Rent was in Arrear, so as the Cattle might be sold to satisfy the Rent according to the Statute 17 Car. 2. and it being moved, that this might be supplied by a Writ of Enquiry, as it was in Specott's Case; per Curiam, it was so done in that Case, because the Party might have his Judgment at Common Law; but now, by this Statnte 'tis enacted, That the Value of the Rent shall be enquired by the same Jury which tries the Issue, and therefore it cannot be supplied by a Writ of Enquiry.

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